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Supreme Court, U.S.
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No. 86-

IN THE

Supreme Court Of The United States

October Term, 1986

RUSSELL JACKSON, et al, individually and on behalf of all other holders of 5% Hukuang Railways Bearer Bonds issued by the Imperial Chinese Government in 1911, similarly situated,

Petitioners,

v.

THE PEOPLE'S REPUBLIC OF CHINA,
a foreign government,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OF COUNSEL:
W. Eugene Rutledge
RUTLEDGE & KELLY, P.C.
1300 Brown Marx Tower
Birmingham, Alabama 35203
Telephone: (205) 322-8761

Counsel for Petitioners

QUESTIONS PRESENTED

1. Does the Foreign Sovereign Immunities Act, 28 USC §§ 1602-1611 (hereinafter the "Act"), which became effective by its terms January 24, 1977, apply only to obligations of foreign sovereigns to citizens of the United States incurred subsequent to the effective date of the Act?

2. In the alternative, does the Act apply only to obligations of foreign sovereigns to citizens of the United States incurred since 1952, the date of the "Tate Letter"?

3. Are all obligations of foreign sovereigns to citizens of the United States incurred prior to the effective date of the Act, or in the alternative, the date of the "Tate Letter," barred from collection under the Act because the Act does not apply retroactively to its effective date, or, alternatively the date of the Tate Letter, so that all obligations of foreign sovereigns to citizens of the United States incurred prior to 1952 may not be collected without the permission of the foreign sovereign under the doctrine of absolute sovereign immunity?

4. Prior to 1952, did the United States adhere to the doctrine of absolute sovereign immunity so that obligations of foreign sovereigns to citizens of the United States could not be collected without the permission of the foreign sovereign because of the absolute immunity afforded such sovereigns by the doctrine of absolute sovereign immunity?

5. Is a United States district court authorized under the provisions of Rule 60(b) F.R.Civ.P. to set aside a default judgment awarded against a foreign sovereign eleven months earlier by that same court where the foreign sovereign, properly served under the Act refused to appear in the United States Court for 50 months because of its insistence that the United States was prohibited by international law from making the foreign sovereign subject to the jurisdiction of its courts and where the appearance of the foreign sovereign in the United States court resulting in setting aside the default judgment was limited to the sole purpose of the foreign sovereign asserting

the international law defense against the jurisdiction of the United States court?

6. Does the Act authorize a United States district court to dismiss actions filed under it without allowing any discovery against the foreign sovereign where factual questions are involved and form a basis for the district court's decision to dismiss the action?

PARTIES BELOW

Parties in the Court of Appeals were appellants, Russell Jackson, Greg Alden Church, Lawrence Goldsmith, Jr., Chauncey D. Jackson, II, Emerald M. Jackson, James M. Patterson, Jr., Charles K. Edwards, Charles Kratch, Kenneth Brown, individually and on behalf of all other holders of 5% Hukuang Railways Bearer Bonds issued by the Imperial Chinese Government in 1911, similarly situated; and appellee, The People's Republic of China, a foreign government.

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IN THE

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RUSSELL JACKSON, et al, individually and on behalf of all other holders of 5% Hukuang Railways Bearer Bonds issued by the Imperial Chinese Government in 1911, similarly situated,

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Petitioners Russell Jackson, Greg Alden Church, Lawrence Goldsmith, Jr., Chauncey D. Jackson, II, Emerald M. Jackson, James M. Patterson, Jr., Charles K. Edwards, Charles Kratch, Kenneth Brown, individually and on behalf of all other holders of 5% Hukuang Railways Bearer Bonds issued by the Imperial Chinese Government in 1911, similarly situated, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, reported at 794 F. 2d 1490, is printed as

Appendix A. The unreported opinion of the United States District Court for the Northern District of Alabama is printed as Appendix F and the subsequent opinion of the United States District Court for the Northern District of Alabama reported at 596 F. Supp 386 is printed as Appendix G.

JURISDICTION

The judgment of the Court of Appeals was entered July 25, 1986, Appendix A. The timely petition for rehearing of petitioners, Russell Jackson, Greg Alden Church, Lawrence Goldsmith, Jr., Chauncey D. Jackson, II, Emerald M. Jackson, James M. Patterson, Jr., Charles K. Edwards, Charles Kratch, Kenneth Brown, et al, individually and on behalf of all other holders of 5% Hukuang Railways Bearer Bonds issued by the Imperial Chinese Government in 1911, similarly situated, was denied by the Court on September 3, 1986, Appendix B. The jurisdiction of this Court is invoked under 28 USC § 1254 (1).

STATUTES INVOLVED

Foreign Sovereign Immunities Act, 28 USC §§ 1602-1611. (Appendix H)

STATEMENT OF THE CASE

The Imperial Government of China in 1911 sold in several western nations, including the United States, 6,000,000 Pounds Sterling in bonds for the purpose of building the Hukuang Railroad. The Hukuang Railroad was critically important to China. The inadequate roads in China mandated that transportation was mainly human carrier or ox cart. The interior of China where the grain and agricultural products, the main economic produce of China, were grown lacked transport to the ports for shipment by sea and the only answer was some form of centralized railroad system. The Hukuang Railroad built with the bonds at issue in this case was, and is presently,

the main north-south railroad line which connected the ports to the interior of China.

The bonds were originally scheduled to be amortized over a forty year period. However, due to the chaotic conditions in China the payments were erratic and in 1937 there was a renegotiation of the bonds which provided for an interim interest reduction and amortization to begin in 1941 and to be completed in thirty-nine years from 1937, that is in 1976. This renegotiation was accepted by both the Chinese nationalist government of Chiang Kai-Shek and the American bond holders committee, the group then representing the lenders. The Chinese announced on April 4, 1937 the renegotiation of the loan.

World War II prevented the Chinese from making the full payments under the renegotiated agreements, though some interest payments were made following the renegotiation. The Chinese civil war immediately after the conclusion of World War II, followed by the communist takeover, resulted in the renegotiation schedule not being followed. However, in 1947 the obligations represented by the bonds were reaffirmed in an announcement of August 13, 1947 by the Nationalist Government before it left the mainland for Taiwan.

Since 1949 the Hukuang Railroad has been under the exclusive control of the People's Republic of China (the PRC). The railroad has continued to function and to date provides the principal north-south link between the interior of China and the southern Chinese ports. The People's Republic of China has enjoyed the benefit of the railroad, for example 856,000,000 passenger miles in 1979, and the railroad is central and critical to the current Chinese transportation system and economy.

The United States has not recognized any government as the *de jure* government of the Chinese mainland since 1949 until the recognition of the People's Republic of China in 1979. This action was commenced on November 13, 1979, immediately after the recognition of the People's Republic of China by the United States.

Service was obtained on the PRC through the State Department's Director of Special Consular Services on January 24, 1980. The PRC responded to this service by rejecting the summons and complaint with a diplomatic note dated March 29, 1980 which rejected the right of the United States to require the PRC to appear before its courts. The diplomatic note stated that "as a sovereign state [it] enjoys immunity from jurisdiction in other countries".

On October 22, 1981, the district court entered default against the PRC finding that it had been properly served with process under the Act and had failed to appear or answer within the time allowed by law. The class of bond holders was also certified by the district court on that date. The PRC was served with notice of the default and with a copy of the class certification order, both English and Chinese translation, but again rejected and returned these documents by diplomatic note dated December 17, 1981 stating that the papers were being rejected for the same reasons earlier set forth.

On March 29 and 30, 1982 the district court held a hearing on the issue of damages and on September 1, 1982 issued a memorandum opinion holding that the district court had subject matter jurisdiction, that the PRC had been served pursuant to the Act and that the plaintiff class was entitled to payment of all unpaid interest and principal on the Hukuang bonds, which on that date amounted to $41,313,038. (550 F. Supp. 869 (N.D. Ala. 1982)) Copies of the default judgment and opinions, translated into Chinese, were served on the PRC on October 18, 1982 and returned and rejected by the PRC with a diplomatic note dated October 25, 1982.

The position of the PRC was summed up in its diplomatic note dated January 15, 1982 in which the PRC asserted that it would "accept no suit filed against it by any person at a foreign court"; that it recognized no liability incurred by "successive reactionary governments in the past"; and that in the event the district court should proceed "with its default judgment against China and attach China's properties in the United States, the Chinese government will reserve its right to take

corresponding measures";[1] and that the ruling of the district court was "in violation of the basic norms of international law."

On February 2, 1983 during a visit of senior United States officials to the PRC, the Chinese foreign minister Wu Xueqian, presented the Secretary of State, George P. Shultz, with an *Aide Memoire* setting forth the views of the PRC with regard to this case. The *Aide Memoire* stated, among other things, that the PRC recognizes no obligation to pay external debts incurred by earlier Chinese governments, that the PRC enjoys absolute sovereign immunity and that the State Department has "shirked its responsibility" to handle the matter properly, i.e.: get it dismissed.

Secretary Shultz proposed that the United States send a delegation to the PRC to discuss the legal matters involved in this case with Chinese officials. This proposal was accepted in March of 1983, but was subsequently rejected when a Chinese tennis player defected to the United States. However, in June of 1983 the PRC agreed to allow the United States to send a delegation to explain the laws of the United States. The Chinese, following meetings in Beijing and Washington, "reluctantly" agreed to retain counsel to present its views to the district court.

The plaintiff class on June 17, 1983 filed a motion to obtain an order from the district court that a reasonable period of time had lapsed following the entry of the default judgment so that the plaintiff class could begin attachment or execution proceedings on Chinese property located in the United States. On August 12, 1983, eleven months and ten days after the default judgment had been entered against the Chinese on September 2, 1982, the PRC filed a motion to vacate the default judgment under Rule 60(b). The PRC also filed a motion opposing the requested order authorizing the plaintiff class to begin execution or attachment and filed a motion to dismiss

[1]This threat has never been withdrawn or even modified by the PRC. Accordingly, the PRC should not be entitled to equitable relief under Rule 60(b), F.R.Civ.P., with such a threat outstanding.

the complaint. On August 18, 1983 the United States filed a "statement of interest" under 28 U.S.C. 517 which was, in reality, a brief in support of the efforts of the PRC to set the default judgment aside and to dismiss the claims of the plaintiff class against China.[2]

The PRC has consistently taken the position that international law provides for absolute sovereign immunity so that no nation may adopt legislation which requires foreign sovereigns to appear in its courts and defend against claims of its citizens against the foreign sovereign. The Chinese assert that this is an absolute and immutable principle of international law and that the United States violated that law when it adopted the Act. The Chinese also contend that the Hukuang Railroad bonds represent "an odious debt" resulting from Western colonialist powers forcing the debt and the railroad on the Imperial Government in 1911.[3]

The district court refused to allow the plaintiff class any discovery against the PRC. One of the points argued by the United States on behalf of the PRC was that the statute of limitations barred any collection of these bonds and that there was no renegotiation of the debt in 1937 as claimed by the plaintiff

[2]The State Department admits that as part of the "deal" to get the PRC to appear and ask the district court to set aside the default judgment and dismiss the case, it agreed to support the PRC efforts in this regard.

[3]Both of these positions were rejected by the lawyer now representing the PRC in an article written for the China Law Reporter Volume II, No. 3, Spring 1983, pp. 129-152, "China and Sovereign Immunity: The Hukuang Railway Bonds Case", Eugene Theroux and B. T. Peele. The article was written by Mr. Theroux before he was retained by the PRC, but after the original district court opinion in this case was published. The article makes the point that the socialist and communist countries with State owned businesses always urge absolute sovereign immunity so that their citizens can sue western, private business corporations, while their own State owned corporations are exempt from suit. The article specifically recognizes that ". . . the restrictive theory has been adopted in widespread fashion throughout the world today." (p. 135) As to rejection of the Hukuang bonds as an "odious debt", Mr. Theroux states that "a successor state's liability . . . for a loan to a predecessor turn upon whether the successor government would be 'unjustly enriched' if it did not assume a debt." (p. 147) The value of the Hukuang Railroad to the PRC has already been mentioned above.

class. The plaintiff class propounded interrogatories, requests for production and filed requests for admissions under the F.R.Civ.P. designed in part to prove the renegotiation. The district court quashed these discovery efforts.[4]

The district court granted the motions of the PRC to set aside the default judgment and to dismiss the claims of the plaintiff class. (596 F. Supp. 386 (N.D. Ala. 1984)) The Rule 60 (b) (4) relief setting aside the default judgment was granted by the district court because of "the existence of pregnant questions relating to the jurisdiction of the Court" and the opinion of the district court that "The interests of justice require that these jurisdictional questions be determined in the context of adversarial proceedings." (App. F, pg. 4) The district court also granted relief under Rule 60(b) (6) based on the representations as to the public interest made in the statement of interest filed by the United States that "a failure to set aside the default judgment may adversely impact on important and delicate United States-Sino relations."[5]

The district court dismissed this case for lack of subject matter jurisdiction based on the single ground that the Act did not apply retroactively since the rights of a party pursuant to a contractual agreement are determined by the law existing when the contract is made and the law of the United States at the time of the issuance of these bonds was absolute sovereign immunity. Therefore, the district court held the doctrine of abso-

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[4]The question of the renegotiation of the bonds, which the district court found did not happen, 550 F.Supp. at 852; 596 F.Supp. at 385, n. 2, is critical since the circuit court adopted the district court findings that the bonds matured in 1951, the original maturity, and were thus pre-1952.

[5]The district court specifically denied relief based on Rule 60(b) (1) stating, "The court does not find that China is entitled to relief because of mistake, inadvertent, surprise, or excusable neglect." (App. F, pg. 3 n. 3) The district court also specifically found that it would not set aside the default judgment because of alleged errors in the Chinese translation of the court papers served on the PRC. (App. F, pg. 5) Finally, the district court specifically held that it would not grant relief based on the Chinese argument that the plaintiff class had failed to establish a claim or right to relief as required by 28 U.S.C. § 1608(e), "by evidence satisfactory to the Court." (App. F, pg. 5).

lute sovereign immunity governed this action and not the Act's application of the doctrine of restrictive sovereign immunity suits against foreign sovereigns.

The plaintiff class appealed the decision of the district court to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit affirmed the district court. The circuit court stated:

> We agree with the district court's general approach to retroactivity. The courts normally presume that a legislative enactment is to apply prospectively [cite omitted] and the presumption is a strong one [cite omitted]. We agree with the court's analysis of the language of the statute itself and of the legislative history. In these, both senate and house reports state that [the Act] was not intended to affect the 'substantive law of liability' [cite omitted]. We agree that to give the Act retrospective application pre-1952 would interfere with antecedent rights of other sovereigns (and also with antecedent principles of law that the United States followed until 1952). It would be manifestly unfair for the United States to modify the immunity afforded a foreign state in 1911 by the enactment of a statute nearly three quarters of a century later. (794 F. 2d at 1497-8; Appendix A pg. 13-14)

REASONS FOR GRANTING THE WRIT

I.

The Eleventh Circuit Has Decided An Important Question of Federal Law, the Retroactive Application of the Act, Wrongly and In Conflict With the Decisions of This Court.

The essence of the circuit court decision is that somehow China acquired a right in 1911 based on the law of the United States at that time regarding sovereign immunity that the United States could not thereafter change as to this bond issue by the subsequent enactment of a statute. The plaintiff class respectfully suggests that this ruling is wrong because, (1) it misstates the law with regard to the rights acquired by any entity in the existing law at the time that entity enters into a

contract, and, (2) because it ignores the principle announced in *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812) that the United States extends whatever rights and immunities it chooses to a foreign sovereign as a matter of grace only.[6]

The cases hold that a party to a contract acquires no rights in the law existing at the time that the contract was made so that the contract must forever after be interpreted according to the law existing at the time that the contract was made. This court held in *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 78 L.Ed. 413, 54 S.Ct. 231 (1934) that the constitutional prohibition of impairing the obligation to contract was limited by certain rights reserved by the State. This court stated in *Blaisdell*, quoting with approval from *Manigault v. Springs*, 199 U.S. 473, 50 L.Ed. 274, 26 S.Ct. 127 as follows:

> It is the said law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contract between individuals. (290 U.S. at 437)

The case of *Norman v. Baltimore and Ohio Railroad Company*, 294 U.S. 240, 79 L.Ed. 885, 55 S.Ct. 407 (1935) affirmed this rule by approving the power of Congress to pass legislation which swept away the gold clause in the thousands of existing contracts which provided that the obligations of those contracts would be paid in gold. The purpose of such clauses was obviously to protect the creditor against inflation and the diminished value of the contract payments that would result from

[6]The circuit court opinion gives "lip service" to this rule, but applies it only in the sense that it holds sovereign immunity rules are "not a restriction imposed by the Constitution itself." (794 F. 2d at 1492)

inflation if those payments were made in the currency of the time.

Consequently, the PRC as a matter of law was on notice from the doctrine announced by Chief Justice Marshall in the *Schooner Exchange v. McFadden* case that any immunity extended to it by the United States was merely a matter of grace which could be changed at the pleasure of the United States and the PRC should have been on notice that it could not depend on the law of the United States regarding sovereign immunity remaining the same throughout the long history of the repayment of the Hukuang Railroad bonds.

Moreover, there is no basis for the circuit court to choose 1911 as the date on which the rights of the parties, whatever they may have been, vested, since there was a voluntary renegotiation of the debt in 1937. The law of the United States in 1937 was not to the effect that absolute sovereign immunity was available to all foreign sovereigns. The law in this regard had begun to change in the United States many years before 1937.[7]

This Court reaffirmed in *Verlinden v. Central Bank of Nigeria,* 461 U.S. 480, 76 L.Ed.2d 81, 103 S.Ct. 1962 (1983) the *Schooner Exchange* doctrine that the foreign immunity extended to foreign sovereigns by the United States was "a matter of grace and comity on the party of the United States" and not a right on the part of the foreign sovereign. (461 U.S. at 486) This Court also held that prior to the adoption of the Act, the standards for granting or denying foreign sovereigns immunity "were neither clear nor uniformly applied." (461 U.S. at 488)

In *Alfred Dunhill of London, Inc. v. Cuba,* 425 U.S. 682, 48 L.Ed.2d 301, 96 S.Ct. 1854 (1976) this Court held that the doctrine of sovereign immunity as an absolute defense had been severely undermined at least as early as 1943 in *Ex Parte Peru,*

[7]The plaintiff class would have been able to establish beyond question the renegotiation of the bond issue repayment schedule making the last payment due in 1976 if the district court, affirmed by the circuit court, had not prevented all discovery. As it was, the plaintiff class presented to the district court the expert testimony of Dr. Roy Cline and others that the renegotiation took place as stated herein.

318 U.S. 578, 87 L.Ed. 1014, 63 S.Ct. 793 (1943). A second decision, *Mexico v. Hoffman*, 324 U.S. 30, 89 L.Ed. 729, 65 S.Ct. 530 (1945) certainly made it clear that there was no doctrine of absolute sovereign immunity in the United States on which foreign sovereigns could rely.

The 1926 decision in *Berizzi Brothers Co. v. Steam Ship Pesaro*, 271 U.S. 562, 70 L.Ed. 1088, 46 S.Ct. 611 (1926) clearly stands for the proposition that the law of absolute foreign sovereign immunity was already changing in the United States in 1926. The *Berizzi Brothers* case stands for the proposition that the Congress should avoid "sudden changes" in the immunity of foreign states without prior adequate notice. However, since the bonds in question in this case were not renegotiated until eleven years after the *Berizzi Brothers* opinion and the first payments were not made until 1939, thirteen years after that opinion, the "sudden notice" doctrine can hardly apply.[8]

The circuit court does not adequately explain why pre-1952 events rather than events prior to the effective date of the Act, such as the renegotiated repayment schedule ending only in 1976, the year before the effective date of the Act, should be the key to determining the retroactive application of the Act. Presumably, the 1952 date is chosen because the circuit court is of the opinion that the "Tate Letter" published by the State Department in that year was sufficient to place foreign sovereigns on notice that the doctrine of absolute sovereign immunity was being modified by the United States.[9] The circuit court apparently overlooked the fact that the "Tate Letter" specifically recognized that the courts were not bound

[8]In a footnote in *Mexico v. Hoffman*, (324 U.S. at 35, n. 1) Justices Black and Frankfurter concurred on the basis that *Berizzi* was being overruled in that case so that even the "sudden changes" rule is not the law and has not been since 1945.

[9]The "Tate Letter" was written on May 19, 1982 by Jack B. Tate, acting legal adviser to the State Department to the Attorney General of the United States, announcing that "it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in consideration of requests of foreign governments for a grant of sovereign immunity." *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682 (1974), Appendix 2, at 425 U.S. 711-715, 714.

by any such rule. Moreover, the cases of *Mexico v. Hoffman, supra,* and *Ex parte Peru, supra,* were adequate notice of a change in position by the courts if, indeed, the *Berizzi Brothers* opinion in 1926 did not serve any notice function.[10]

There are several cases which apply the Act retroactively to events and transactions "pre-1952." *Schmidt v. The Polish People's Republic,* 579 F. Supp. 23 (S.D. N.Y. 84), affirmed 742 F. 2d 67 (CA2 1984); *Von Dardel v. U.S.S.R.,* 623 F. Supp. 246 (D.D.C. 1985); *Verlinden B.V. v. Central Bank of Nigeria,* 76 L.Ed.2d 81, 103 S.Ct. 1962, 461 U.S. 480 (1983).[11]

The circuit court places great emphasis in its opinion on the decision in *Corporacion Venezolana de Fomento v. Vintera Sales,* 629 F. 2d 786 (CA2 1980), cert. denied 449 U.S. 1080 (1980). However, in *Schmidt v. Polish People's Republic,* 742 F. 2d 67 (CA2 1984), the Second Circuit affirmed the district court which specifically found it had subject matter jurisdiction under the Act of an action based on events which took place in 1937 and 1939. The case was dismissed by the district court because it was barred by the New York statute of limitations and the circuit court did not reach the cross-appeal of Poland on lack of jurisdiction. Yet, it is clear from the opinion that the circuit court chose to resolve the case on the more complex ground of the New York statute of limitations rather than merely citing the *Venezolana* opinion for lack of jurisdiction. This was no doubt because *Venezolana* decides only that the Act did not apply to cases *pending* when it was adopted. This is clear from the following language in *Venezolana*:

". . . We need not reach the troubling question of whether

[10]The plaintiff class specifically rejects the necessity of any notice under the opinion in *The Schooner Exchange* case, but states that even if such notice was required, the PRC had such notice. Notice of a change in the law as a pre-condition to the right of the United States to change the law would make the grant of sovereign immunity by the United States something other than "a matter of grace."

[11]Also in *Asociacion de Reclamantes v. The United Mexican States,* 735 F. 2d 1517 (D.C. Cir. 1984), then Circuit Judge Scalia wrote an opinion which clearly assumed that the Act applied to events taking place in 1941 and gave the D.C. Circuit subject matter jurisdiction over those events.

> or not Congress can confer jurisdiction *in pending cases*, and thus further undermine the principle that jurisdiction is determined at the commencement of suit, because we cannot agree with the district court's view that Congress intended *such retroactivity* in the case of the FSIA [the Act]. (629 F. 2d at 791) (Emphasis supplied)

The suit in *Schmidt* was filed in December, 1982 (579 F. Supp. 26) and the district court opinion was rendered on January 16, 1984, 579 F. Supp. 23 (S.D. N.Y. 1984). The district court specifically found that, "FSIA gives the Court jurisdiction over *any* non-jury civil action against a foreign state as long as the defendant is not entitled to sovereign immunity." (Emphasis supplied) (579 F. Supp. at 26) As stated above, the transactions giving rise to the suit arose in 1937.

Therefore, these opinions make it clear that *Venezolana* applies only to cases pending when the Act was adopted and was inappropriately relied on by the Eleventh Circuit.

The preamble to the Act states:

> *[C]laims* of foreign states to immunity should *henceforth* be decided by the courts of the United States . . . in conformity with the principles set forth in this Chapter. (Emphasis supplied)

Nothing in the Act subsequently limits this directive. The Court should note that the preamble states that the Act applied to the foreign sovereigns' "claims" to immunity and does not refer to the dates of the transactions on which the claims against such foreign sovereigns may be based. Certainly the Congress must have anticipated that the many obligations of foreign sovereigns to United States citizens pre-dating 1977 and 1952 would be a subject of litigation under this Act. The use of the above language in § 1602 directing that claims of immunity made by foreign sovereigns in such cases should be decided under the Act, manifests an intent of Congress to provide a unitary procedure and not the bifurcated procedure the circuit court would impose on the resolution of those claims.

Moreover, the legislative history of the Act makes it clear that Congress intended that all future claims by United States

citizens against foreign sovereigns, whenever the transactions on which the suits were based occurred, should be decided under the Act without exception. H. R. Rep. No. 94-1487, 94th Cong., 2d Sess., 1-14, *reprinted in* [1976] U.S. Code Cong. and Ad. Nws. 6604, 6613 ("The Act sets forth the legal standards under which federal and state courts would henceforth determine *all* claims of sovereign immunity raised by foreign states.") Again, the House Report expressly states that the Act sets forth "the *sole and exclusive standards* to be used in resolving questions of sovereign immunity raised by foreign states before federal and state courts. . . ." (*Id.* at 12) (Emphasis added) Surely, if the Congress had intended the courts to somehow divide and apply the various pre-Act immunity principles in cases arising from pre-enactment or pre-Tate Letter events, it would have been easy enough for the Congress to so provide. As the Court stated in *Eikenberry v. Callahan*, 653 F. 2d 632, 632 N. 5 (D.C. Cir. 1981), "Congress knows how to restrict the retroactive application of the laws it enacts if it so wishes."

II.
The Circuit Court Applied Rule 60(b), F.R.Civ.P., Wrongly and In Conflict With the Decisions of This Court and Other Circuits In Setting Aside the Default Judgment.

The second point that the plaintiff class brings to the attention of this Court is the application of Rule 60(b) to set aside a default judgment obtained against a foreign sovereign in circumstances that would not be applied in any other case. The PRC has made it clear from its initial appearance that it only appeared in the district court at the urging of the United States Government to state its position that foreign sovereign immunity was absolute in international law and that the United States had no right to apply any different law in its courts, and for no other reason. The PRC has made it clear that if this position was not accepted, it would not participate in any further proceedings. This does not entitle the PRC to equitable relief under Rule 60(b).

a. The 60(b) (1) and (4) Claims Were Denied

The district court completely eliminated the Rule 60(b) (1) claims as a basis for setting aside the default in this finding, "The Court does not find that China is entitled to relief because of mistake, inadvertence, surprise or excusable neglect." (App. F, page 3, n. 3)

Secondly, as to 60(b) (4), the district court rejected the PRC claims of lack of jurisdiction of the person which was based on faulty service of process *because* the Chinese translations were faulty *or* because the translations used classical characters rather than modern simplified characters (App. F, page 5, n. 6).

The district court did, however, state in the opinion setting aside the default that the PRC claim that the summons served on the PRC was "not translated into Chinese stands on a different footing" because of the absence of direct evidence of the existence of a translated summons. The district court stated, "The burden is on the plaintiffs to show that they have complied with this requirement, and the Court is not satisfied that they have carried this burden." (App. F, page 5)

The plaintiff class, following the February 27, 1984 order setting aside the default judgment, sought by discovery to show that the PRC had received a translated copy of the summons. The plaintiff propounded a "Request for Admissions" pursuant to Fed.R.Civ.P. 36(a) on May 29, 1984. Among the requests were the following:

> 4. That the PRC was served with a copy of a summons in this case translated into some form of the Chinese language.
>
> • • •
>
> 6. That the PRC was served with a Chinese translation of the summons in this lawsuit.

Rule 36(a) provides that the matters set forth in requests for admissions are deemed to be admitted unless within 30 days after service of the request the party to which the request was directed serves on counsel making the request a written objection or answer to the request. The PRC never made any response to the plaintiffs' "Request for Admissions", though *un-*

timely objections, that is after the time for response expired, were made to the plaintiffs' interrogatories and requests for production.

Rule 36(a) further provides that the district court may consider and rule on objections to requests for admissions, but no objections were ever made by the PRC to the plaintiffs' "Request for Admissions" and the district court never entered any ruling whatsoever concerning these requests for admissions.

Therefore, according to the Federal Rules of Civil Procedure, the PRC has admitted that it was served with a copy of a "Chinese translation of the summons".

b. The District Court Improperly Construed Rule 60(b)(4) As To Lack Of Subject Matter Jurisdiction

The district court found in its opinion setting aside the default judgment that there were serious jurisdictional questions which troubled him and held, "Because of the existence of pregnant questions relating to the jurisdiction of the Court, the default judgment should be set aside under Fed. R. Civ. P. 60(b)(4)." (App. F, page 5). Those "pregnant questions" were stated as, (1) "Unless FSIA applies retroactively, the principle of absolute sovereign immunity would bar this action altogether." (App. F, page 4); (2) Whether the issuance of the bonds was a "commercial activity" within the meaning of the FSIA. (App. F, page 4). The district court did not rule on these points, but merely stated an uncertainty concerning them. The district court misconstrued and misapplied Rule 60(b)(4) in setting the default judgment aside on this basis. The Eleventh Circuit did not reach the Rule 60(b)(4) issue because it affirmed the district court under Rule 60(b)(6). The Eleventh Circuit was just as erroneous as the district court in stating that "*arguably* the . . . judgment was void . . ." (Appendix A, p. 10 n. 2) (emphasis supplied).

Rule 60(b)(4) does not authorize a court to set aside a final judgment because it *may* be void; it must be void. *Wright and Miller* state this rule clearly:

> Rule 60(b) (4) authorizes relief from void judgments. Necessarily a motion under this part of the rule differs markedly from motions under the other clauses of Rule 60(b). There is no question of discretion on the part of the court when a motion is under Rule 60(b) (4) . . . Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but *when* that question *is resolved*, the Court *must* act accordingly. Wright and Miller *Federal Practice and Procedure*, § 2862, Volume 11, page 197 (1973). (Emphasis supplied)

It was clearly an error of great magnitude for the district court to set aside the judgment because it *might* be void as the law is clear that a judgment is void under 60(b) (4) *only* when there is a plain usurpation of power by the court. Stated another way, a judgment is void under this rule only when there is a *total want* of jurisdiction as distinguished from an *error in the exercise* of jurisdiction. *Honneus v. Donovan*, 691 F.2d 1 (1st Cir. 1982); *Kansas City Southern Railway Company v. Great Lakes Carbon Corporation*, 624 F.2d 822 (8th Cir. 1980); *Lubben v. Selective Service System Local Board No. 27*, 453 F.2d 645, 649 (1st Cir. 1972) (An error in the determination of jurisdiction does not render the judgment void.)

It is clear in this case that the question of whether or not the sale of the bonds by China was a "commercial activity" within the meaning of the FSIA was considered by the district court at the time the default judgment was granted and entered:

> "It is clear that the sale, issuance for sale and authorization of issuance for sale in the United States constitutes a "commercial activity" carried on in the United States by a foreign state. [Citations omitted] Therefore, the defendant is not entitled to the general immunity granted to foreign states under 28 U.S.C. § 1604 with respect to the bonds which are the basis of this suit. (App. C, pages 6-7)

The district court concluded in the opinion setting aside the default judgment that:

> "Upon consideration of China's briefs and arguments, the issue [the "commercial activity issue"] is not as clear as the

court once thought and it should be reconsidered by the court." (App. F, page 4)

The district court did not even decide it had in fact made an error when it initially considered the "commercial activity" issue, much less that there was a "total want of jurisdiction". This finding is not adequate to support setting aside the default judgment under Rule 60(b) (4).

Moreover, the district court did not make an error when it first decided the "commercial activity" issue in favor of its jurisdiction.

The Hukuang Imperial Government Railways Final Agreement was signed on May 20, 1911 by the Chinese Government and by British, French, German and American banking groups. Pursuant to Article X of the Agreement, which authorized the banks to issue bonds for the amount of the loan, the American banking group proceeded to issue and sell bearer bonds in 20 and 100 pound Sterling denominations to purchasers in the United States. These American purchasers paid for the bonds in dollars in New York and were to be paid interest and principal in dollars in New York.

The legislative history of the Act and the cases construing the Act establish this as a "commercial activity".

Section 1605(a) (2) provides in pertinent part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —
>
> * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state. . . .

Definitions are set forth in §§ 1603(d) and (e):

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. *The commercial character of an activity shall be determined by reference to the nature*

> *of the course of conduct or particular transaction or act, rather than by reference to its purpose.* (Emphasis supplied)
>
> (e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having *substantial contact* with the United States. (Emphasis supplied)

The statutory directive to look to the "nature" of the activity rather than to its "purpose" is more fully explained in the House Report:

> As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment *for its armed forces* or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs of an embassy building. Such contracts would be considered to be commercial contracts, even if their ultimate object is to further a public function. H.R. Rep. No. 94-1487, *supra*, at 16 (emphasis added).

It is obvious that the example of "buying shoes" for the military forces of a country was used to illustrate that while only a sovereign can maintain a military force, anyone can "buy shoes" for a group of people. Therefore, it is the "buying of the shoes", not the nature of the ultimate user of the shoes, that is to guide the determination of the "commercial activities" question.

Courts construing the "commercial activities" provisions of the FSIA have uniformly recognized that the determinative issue is the nature of the activity underlying the suit and not its purpose. The issue is "what [the foreign state] did, not why [it] did it." *Letelier v. Republic of Chile*, 567 F.Supp. 1490 (S.D.N.Y. 1983). Thus, in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F. 2d 300, 309 (2nd Cir. 1981), the Second Circuit stated that the rule to be used in

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identifying a "commercial activity" under the FSIA is whether "the activity is one in which a private person could engage."[12]

Applying the foregoing principles to the Hukuang Railways loan, it is immediately apparent that the action of the Chinese Government in contracting with the United States banks and in authorizing them to issue and sell to United States citizens on its behalf some millions in Pound Sterling bearer bonds constitutes a "commercial activity carried on in the United States" within the meaning of §§ 1603(d) and (e). Because private persons or entities can do what the Chinese Government did — *i.e.*, borrow money by issuing and selling bonds — the Hukuang loan of 1911 is a "commercial activity." The motives behind the borrowing and the use to which the borrowed monies were put are simply irrelevant.

Moreover, the legislative history of the Act specifically provides that the borrowing of monies by a foreign state for any purpose whatsoever is a "commercial activity" under the FSIA. Section 1606 of an earlier, but unadopted, bill similar to the FSIA had excepted from the "commercial activity" category public debts incurred for "general governmental purposes." The provision was deleted from the Act because the Congress decided that "both a sale of bonds to the public and a direct loan from a U.S. commercial bank to a foreign government are activities of a commercial nature and should be treated like other similar commercial transactions." (H. R. Rep. No. 94-1487, *supra*, at 10.) As a number of commentators have observed, the deletion of this section 1606 from the earlier pro-

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[12]This rule has been uniformly followed by the courts. *Letelier v. Republic of Chile*, supra, (action of Chilean national airline in transporting and assisting an airline passenger is "commercial activity," even where passenger was on official assassination mission; an airline's action assisting a passenger was one in which a private person could engage and its "motives [were] of no relevance"); *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094 (S.D.N.Y. 1982) (action of Irish governmental instrumentality in, *inter alia*, promoting investment in Ireland is a "commercial activity" because it is "*by nature*, no different at all from the promotional activities engaged in by a private public relations firm") (emphasis in original).

posed bill can have no other meaning than that the borrowing of monies by a foreign state for any purpose is to be treated as "commercial activity." *See* G. Delaume, *Public Debt and Sovereign Immunity: The Foreign Sovereign Immunities Act of 1976,* 71 Am. J. of Int'l Law 339, 404-405 (1977). *See also* H. R. Rep. No. 94-1487 *supra,* at 16-17 (identifying borrowing of money as an example of "commercial activity").

The district court also stated in the February 27, 1984 order setting aside the default judgment that:

> "Unless FSIA applies retroactively, the principle of absolute sovereign immunity would bar this action altogether. *At this point,* it is *unclear* to the court whether Congress intended that FSIA would apply to transactions such as the one *sub judice,* occurring sixty-five years prior to its enactment. (App. F, page 4) (Emphasis supplied)

Once again, the district court clearly states that *"at this point"*, i.e., the point at which it elected to set aside the default judgment and inflict irreparable harm on the plaintiff class, the district court does not decide it has no jurisdiction. The best the district court can say is that it had doubts on the stated jurisdictional questions. This is not an adequate basis to set aside a default judgment under Rule 60(b) (4).

Of course, the district court subsequently decided in another order that "the FSIA cannot be retroactively applied; and, accordingly, this action must be dismissed for want of subject matter jurisdiction". (App. G, page 5) Even in this opinion, however, though it was entered October 26, 1984, eight months after the entry of the opinion setting aside the default judgment, the district court does not find a "total want of jurisdiction" as is required. The best that can be said by the PRC of the findings of the district court is that the district court found an *erroneous exercise* of subject matter jurisdiction. This finding is inadequate to support setting aside the default judgment under Rule 60(b) (4) because:

> (1) It does not meet the requisite standards for such actions;

(2) It was made long after the fact of setting aside the default judgment.

The plaintiff class, of course, was entitled to due process of law. The district court had no authority to take away from the plaintiff class a valuable right, the default judgment, acquired at great expense except as it acted in accordance with due process. The court in *Compton v. Alton Steamship Company*, 608 F.2d 96 (4th Cir. 1979) makes it clear that the grant or denial of a 60(b) (4) motion is *not discretionary*:

> "We are mindful that ordinarily the denial by the district court of a motion to vacate a judgment under 60(b) on any ground *other* than that the judgment is void as a matter of law may only be reversed for abuse of discretion." 608 F.2d at 107.

The Eleventh Circuit applied the discretionary standard in affirming the district court setting aside this default. (794 F.2d at 1496; Appendix A pg. 10-11) and found the district court had not abused its discretion, completely failing to apply the proper standard.

c. The District Court Had No Discretion To Grant The Rule 60(b) (6) Aspect Of The PRC Motion

The law is clear that Rule 60(b) (6) is not available as a ground of relief if Rule 60(b) (1)-(5) are applicable:

> These cases [*Ackerman v. U.S.*, 340 U.S. 193 (1950) and *Klapprott v. U.S.*, 335 U.S. 601 (1949)] certainly seem to establish that clause (6) and the first five clauses are mutually exclusive and that relief cannot be had under clause (6) if it would have been available under the earlier clauses. This reading seems required also by the language of the rule. Despite a few earlier cases that seemed to overlook this point, there is now much authority that the provisions are mutually exclusive. Wright and Miller, *Federal Practice and Procedure*, Civ. § 2864, page 217.

This Court stated in *Klapprott*, supra:

> In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified,

> vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice. 335 U.S. at 614-615.

In *Corex Corp. v. United States,* 638 F.2d 119 (9th Cir. 1981), a successful effort was made to set aside a judgment under Rule 60(b) (6) alleging newly discovered evidence as a ground. The circuit court refused to regard this as a 60(b) (6) ruling but considered it as a 60(b) (2) motion on the basis that newly discovered evidence was covered by 60(b) (2) and was thus not available as a ground under 60(b) (6).

> It is established that clause (6) and the preceding clauses are mutually exclusive; a motion brought under clause (6) must be for some reason other than the five reasons preceding it under the rule. 638 F.2d at 121.[13]

The district court clearly stated it was setting aside the default under 60(b) (6) *only* because the Secretary of State took the position that:

> (1) The PRC did not appear because of its belief that it was not required so to do;
>
> (2) The United States had now successfully convinced the PRC to state its position in court and it should be permitted "to have its day in court";
>
> (3) This would "have ramifications for other important United States interests with respect to China." (App. F. page 6)

The district court then stated the reasons for setting aside the default judgment under 60(b) (6) as follows:

> Of course, this court has never denied China her day in court; *it was instead China's repeated failure to appear that precipitated the default proceedings and judgment.* Be that as it may, the fact is that a failure to set aside the default judgment may adversely impact on important and delicate United States-Sino relations. The public interest

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[13]To the same effect are *Bershad v. McDonough,* 469 F.2d 1333 (7th Cir. 1972) and *Matter of Emergency Beacon Corp.,* 666 F.2d 754 (2nd Cir. 1981).

> therefore requires that the Court's discretion be exercised in favor of setting aside the default and adjudicating the untimely-filed defenses of China.
>
> For this reason, independent of the Rule 60(b) (4) considerations, China's motion will be granted under Rule 60(b) (6). (App. F, pages 6-7) (Emphasis supplied).

The district court set out in the February 27, 1984 opinion that portion of the "Declaration of George P. Schultz" on which he relied in making this decision. (App. F, page 6) It is obvious that this statement is nothing more than a plea of excusable neglect and mistake on behalf of China and a plea that the district court forgive that neglect. For example:

> . . . The United States believes that the PRC's initial failure to appear in these proceedings was based on its belief that international law did not require it to do so . . . (App. F, page 6)

Excusable neglect, mistake, etc., are cognizable under Rule 60(b) (1) and, therefore, may not form a basis for relief under Rule 60(b) (6). The foregoing statements by the district court and the Secretary of State are clearly directed at *excusing* the PRC failure to appear and the district court found there was no just excuse.

This is the rule as stated in *Transit Casualty Company v. Security Trust Company*, 441 F.2d 788 (5th Cir. 1971) as follows:

> Rule 60(b) (1) and Rule 60(b) (6) are not *pari passu* and are mutually exclusive. [Citations omitted]. The reason for relief set forth in Rule 60(b) (1) cannot be the basis for relief under Rule 60(b) (6). 441 F.2d at 792.

Yet, the circuit court affirmed these district court rulings by simply refusing to consider these authorities and instead announcing the erroneous rule that:

> . . . The district court correctly recognized that its Rule 60(b) power was discretionary, and must be liberally construed to achieve substantial justice." (794 F.2d at 1496, Appendix A pg. 10.)

Moreover, even if the 60(b) (6) grounds set out by the district court were not just a rehash of the 60(b) (1) grounds, there is no authority for the district court to set aside this default judgment to serve the "public interest." Rule 60(b) (6) is to be used when appropriate to accomplish justice. *Matter of Emergency Beacon Corp.*, supra, 666 F.2d at 760. The cases have recognized that the prejudice to the plaintiff and the defendant are the determining factors in this decision, not the interest of third parties, no matter how exalted.

In *Amoco Overseas Oil Company v. Compagnie Nationale Algerienne*, 605 F.2d 648 (2nd Cir. 1979), a case based on the FSIA, the court clearly recognized that it was "justice" between the parties that was required under 60(b) (6).

d. The PRC Is Not Entitled To Any Equitable Relief

The PRC has made it clear from the outset of this case that it is the United States and its State Department and courts that have acted wrongfully in this matter. The PRC does not now and never has conceded that it has acted with any fault in refusing to appear in or contest this action. How, then, can the PRC be entitled to the equitable relief of having this judgment set aside?

The district court found there was no excusable neglect, mistake, etc., under 60(b) (1). In fact, as quoted above, the district court found that "it was instead China's repeated failure to appear that precipitated the default proceedings and judgment." (App. F, p. 6) In view of this finding and the continued absolute refusal of the PRC to accept the authority of the district court, what is the basis for *any* equitable relief? Rule 60(b) relief is equitable in character and is properly controlled by traditional equitable principles. *See, e.g., DiVito v. Fidelity & Deposit Co. of Maryland*, 361 F.2d 936, 939 (7th Cir. 1966) (the defendant's failure to explain convincingly why it waited 4½ months after the discovery of alleged fraud in obtaining a judgment before filing 60(b) motion precludes relief because "equity aids the vigilant"); *Carrethers v. St. Louis-San Fran-*

cisco Ry. Co., 264 F. Supp. 171 (W.D. Okl. 1967) (plaintiff's failure to use care to protect his interests and promptly seek redress after ascertaining relevant facts precludes 60(b) relief because of "contributory fault").

Although it is sometimes said that Rule 60(b) should be applied to as to do substantial justice *between the litigants*, it has been consistently recognized that Rule 60(b) relief is "extraordinary," rather than routine, in nature and is properly available only upon a showing, substantiated by adequate proof, of "exceptional circumstances."[14]

The burden is on the party seeking Rule 60(b) relief to show its entitlement to that relief. *Smith v. Kincaid*, 249 F.2d 243 (6th Cir. 1957); *U.S. v. Martin*, 395 F.Supp. 954 (D.C.N.Y. 1975). The moving party must absolutely show a good reason for the delay and the courts "have been unyielding in requiring that a party show good reason for his failure to take appropriate action sooner." 11 Wright and Miller, *Federal Practice and Procedure*, Civ. § 2857, page 160-161.

The PRC has never asked the district court to grant relief under 60(b) because of a mistake *of the PRC* or excusable neglect on the part *of the PRC* in earlier failing to appear. The PRC asks, actually, demands is a better word, that the court set aside the judgment because of mistake or neglect *on the part of the United States*. The PRC continues to maintain that it had and has no duty to appear in this or any other United States Court under any set of facts and that it has acted correctly in refusing to appear.

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[14]*Flett v. W. A. Alexander & Co.*, 302 F.2d 321, 324 (7th Cir. 1962); *John E. Smith's Sons Co. v. Lattimer Foundry & Machine Co.*, 239 F.2d 815, 817 (3rd Cir. 1956); *DiVito v. Fidelity & Deposit Co. of Maryland*, 361 F.Supp. at 173. See also *Ackermann v. United States*, 340 U.S. 193 (1950) (Rule 60(b)(6) relief available only in "extraordinary circumstances"); *Gray v. Estelle*, 574 F.2d 209, 213 (5th Cir. 1978); *Fackelman v. Bell*, 564 F.2d 209, 213 (5th Cir. 1977); *Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693, 695 (5th Cir. 1983), quoting 11 Wright & Miller, *Federal Practice and Procedure*, Civ. § 2858, (60(b)(1) relief on the grounds of mistake "is 'addressed to special situations justifying extraordinary relief, [where] . . . the mistake was attributable to special circumstances.'").

Equity has long required that one who seeks equity must offer to do equity or no relief will be granted and this applies *even to the United States Government. U.S. v. Wilson,* 707 F.2d 304 (8th Cir. 1982):

> We see no reason why on the facts of this case the United States should be excused from the application of the equitable doctrine. It is well established that the United States is subject to general principles of equity when seeking an equitable remedy. [Citations omitted, including *U.S. v. Second National Bank of North Miami,* 502 F.2d 535 (5th Cir. 1974).]
>
> We hold [citations omitted] that "when the government invokes the equity powers of the district court, that court has the power to withhold the relief requested unless the government performs the conditions precedent to its claim. This principle is further supported by decisions of the Fourth, Fifth and Ninth Circuits. [Citing *Ehrlich v. U.S.,* 252 F.2d 72 (5th Cir. 1958) and *Lacy v. U.S.,* 216 F.2d 223 (5th Cir. 1958).

To the same effect are *U.S. v. Desert Gold Mining Company,* 448 F.2d 1230, 1231 (9th Cir. 1971) (United States seeking equity to quiet a title is in no position to protest its corresponding obligations to do equity if it wants to obtain relief); and *Air Transport Association v. Professional Air Traffic Controller Organization,* 313 F.Supp. 181 (D.C.N.Y. 1970).

The obvious question is, if United States Courts require the United States to do equity to obtain equitable relief in those courts, why would not the same rule apply to the PRC? There is no reason. Yet, the circuit court puts all of these authorities aside by making the following statement:

> ". . . We *reject out of hand* the contentions that in seeking an adjudication of jurisdictional issues arising out of United States domestic law China acts improperly in reserving what it conceives are its rights under international law." (Emphasis supplied) (794 F.2d at 1496-7, Appendix A pg. 12)

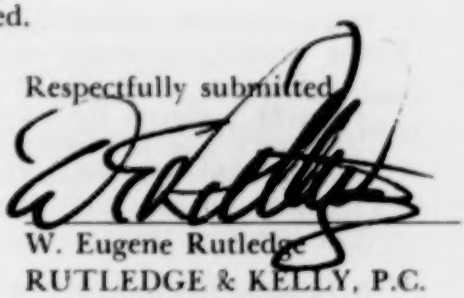
The circuit court misconstrues the position of the PRC and the plaintiffs. The PRC position is that it has "reluctantly"

appeared to state its view of international law and to demand that the United States conform its domestic law to the PRC view of international law. Moreover, says the PRC, if the United States does not so conform, the PRC will not further participate in or be bound by these proceedings. The plaintiff class takes the position that no litigant is entitled to equitable relief when it takes the position that unless the court rules in its favor, it will not be bound by any other decision.

CONCLUSION

The writ should be granted.

Respectfully submitted,



W. Eugene Rutledge
RUTLEDGE & KELLY, P.C.
1300 Brown Marx Tower
Birmingham, Alabama 35203
Telephone: (205) 322-8761

APPENDIX

APPENDIX A

Order Of Eleventh Circuit Court Of Appeals Affirming The Setting Aside Of Judgment And Dismissal Of Case

Russell JACKSON, et al.; individually and on behalf of all other holders of five percent Hukuang Railways Bearer Bonds issued by the Imperial Chinese Government in 1911, similarly situated, Plaintiffs-Appellants,

v.

The PEOPLE'S REPUBLIC OF CHINA, a foreign government, Defendant-Appellee.

No. 84-7744.

United States Court of Appeals, Eleventh Circuit.

July 25, 1986.

Before GODBOLD, Chief Judge, JOHNSON, Circuit Judge, and TUTTLE, Senior Circuit Judge.

GODBOLD, Chief Judge:

We must decide whether in this case the courts of the United States have subject matter jurisdiction over the People's Republic of China. This requires us to examine whether the Foreign Sovereign Immunity Act of 1976 (FSIA), 28 U.S.C. § 1330, 1391 and 1602, *et seq.*, which confers subject matter jurisdiction over foreign sovereigns (with various exceptions), is to be applied retroactively with respect to actions by the governments of China relating to bonds issued by the government of China in 1911.

Before reaching the central issue, we must decide whether the district court erred in setting aside a default judgment entered against the PRC.

The People's Republic (PRC) also raises as a preliminary issue whether, under principles of international law, despite the domestic law of the United States, the courts of the United States have no jurisdiction over any claims against the PRC as a sovereign nation.

The district court entered three determinations. *Jackson v. People's Republic of China*, 550 F.Supp. 869 (N.D.Ala. 1982) (finding jurisdiction and entering default judgment); unpublished order, 2/27/84 (setting aside default judgment); 596 F.Supp. 386 (N.D.Ala.1984) (finding no jurisdiction and dismissing the case).

We hold that the district court did not err in setting aside the default judgment against the PRC. And, reaching the central issue, we hold that the district court was correct in holding that it lacked subject matter jurisdiction because the FSIA did not apply retroactively to confer subject matter jurisdiction in this case.

I. *The facts and the proceedings in the district court*

In 1911 the Imperial Government of China issued bearer bonds to assist in financing the building of a section of the Hukuang Railway that runs between Guangzhou (Canton) and Beijing (Peking). The loan was for 6,000,000 pounds sterling, negotiated and participated in by a consortium of British, German, French and American banks. The loan agreement authorized the issuance of bonds for sale in the United States and bonds were sold to purchasers in this country.

Soon after the bonds were issued the Revolution of 1911 ensued, and the Republic of China supplanted the Imperial Chinese government. The Republic of China made interest payments on the Hukuang bonds until the mid-1930's when it began to have financial and other difficulties.

Plaintiffs introduced expert testimony in the district court attempting to show that the bonds were renegotiated in 1937 by an agreement between the Chinese Nationalist government and an American bondholders' committee representing the lenders, providing for an interim interest rate reduction and for amortization to begin again in 1949 and to be completed in 39 years from 1937, which would be 1976. Statements filed by the PRC say that renegotiation was discussed but no agreement reached. Plaintiffs say that the obligations under the bonds were "reaffirmed" by the Nationalist government just

before its departure for Taiwan in 1948. The district court found that the renegotiation was never agreed upon, 550 F. Supp. at 852; 596 F.Supp. at 388 n. 2, and that the bonds matured in 1951, the original maturity date. Plaintiffs assert that these findings are plainly erroneous.

This class suit was filed November 13, 1979. Jurisdiction was alleged under the FSIA. Service of process was carried out under 28 U.S.C. § 1608(a) (4). PRC responded with a diplomatic note to the Department of State asserting that it enjoyed absolute sovereign immunity. In October 1981 the district court certified a class consisting of all persons who, as of October 22, 1981, were holders of the bonds. On October 28, 1981 the district court held that service of process was proper and, PRC not having appeared, ordered a default. PRC was served with a copy of the class certification order and the notice of default but returned them to the State Department, reasserting absolute immunity.

At plaintiffs' request an evidentiary hearing was conducted. On September 2, 1982, the court held that it had subject matter jurisdiction and that plaintiffs were entitled to all unpaid principal and interest on the bonds, and it entered a judgment of $41,000,000-plus. 550 F.Supp. 869. The PRC sent a diplomatic note to the district court in January, 1983, stating that the rulings of the district court violated "basic norms of international law," and should the court proceed with the default judgment against China and attach China's properties in the United States, the Chinese government reserved its right to take "corresponding measures."

In mid-1983 the plaintiffs began efforts to execute on their judgment. In July or August 1983 the PRC appeared in the case for the first time, filing motions to vacate the judgment under Rule 60(b) (1), (4) and (6) and to dismiss the case. The United States, through the Departments of State and Justice, filed two statements of interest, supported by numerous documents, backing the PRC's motions.

The district court granted the motion to vacate and conduct-

ed an evidentiary hearing on the motion to dismiss and determined it would be treated as a motion for summary judgment. Plaintiffs presented expert testimony. PRC did not appear; the United States was present but did not participate. The district court entered an order dismissing the case on the ground that the FSIA did not have retroactive effect so as to confer subject matter jurisdiction over transactions that predated 1952. 596 F.Supp. 386.

In this court the PRC filed a brief but instructed its counsel not to appear for oral argument. The United States filed a statement of interest and was permitted to argue.

II. *Changing concepts of sovereign immunity under U.S. law*

For more than a century and a half, since *The Schooner Exchange v. McFaddon,* 11 U.S. (7 Cranch) 116, 137 (1812), the United States usually granted foreign sovereigns complete immunity from suit in the courts of this country. Under our law foreign sovereign immunity is a matter of grace and comity on the part of the United States and is not a restriction imposed by the Constitution itself. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). Accordingly, until 1952, our courts consistently deferred to the decisions of the executive branch on whether to take jurisdiction of actions against foreign sovereigns and their instrumentalities. Ordinarily the State Department would request immunity in all actions against friendly foreign sovereigns. *Id.* at 486, 103 S.Ct. at 1967. However, in the decade before 1952 the Supreme Court's doctrinal foundation for sovereign immunity began to shift from formal principles of international law to avoiding embarrassment to those responsible for the conduct of our foreign affairs. *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes,* 336 F.2d 354, 357 (2d Cir.1964), *cert. denied* 381 U.S. 934, 85 S.Ct. 1763, 14 L.Ed.2d 698 (1965); *Ex Parte Peru,* 318 U.S. 578, 63 S.Ct. 793, 87 L.Ed. 1014 (1943); *Republic of Mexico v. Hoffman,* 324 U.S. 30, 65 S.Ct. 530, 89 L.Ed. 729 (1945).

In 1952 the State Department issued the "Tate Letter,"[1] which announced formal adoption by it of the "restrictive" theory of foreign sovereign immunity. Under this theory immunity is confined to suits involving the public acts of a foreign sovereign and does not extend to cases arising out of strictly commercial acts of a foreign state. After the Tate Letter the executive, acting through the State Department, usually would make "suggestions" on whether sovereign immunity should be recognized by a court, and courts generally abided these suggestions. This proved troublesome, because foreign nations at times placed diplomatic pressure on the State Department, and political considerations led to suggestions of immunity where it was not available under the restrictive theory. *Verlinden*, 461 U.S. at 487, 103 S.Ct. at 1968. Moreover, foreign nations did not always make requests to the State Department, and responsibility fell to the courts to determine whether sovereign immunity existed. With two different branches involved the governing standards were neither clear nor uniform. *Id.* at 488, 103 S.Ct. at 1968.

In 1976 Congress passed the FSIA, effective in January 1977.

> By reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States.

Id. at 493, 103 S.Ct. at [sic.] It was adopted to free the government from case by case diplomatic pressures, to clarify the governing standards, and to assure that decisions are made on purely legal grounds and under procedures that insure due process. *Id.* at 488, 103 S.Ct. at 1968. In 28 U.S.C. § 1330 the Act confers jurisdiction of any in personam nonjury civil action against a foreign state with respect to which the foreign state is not entitled to immunity under §§ 1605-1607. The latter sections

[1]Reprinted in 26 Dept. of State Bull. 984-85 (1982) and in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711, 96 S.Ct. 1854, 1869, 48 L.Ed.2d 301 (1976) (App. 2 to opinion of White, J.).

codify into federal law the restrictive theory of sovereign immunity. Thus in many instances the substantive immunity law issues arising out of the sovereign immunity sections, §§ 1605-1607, must be resolved to determine if the court has jurisdiction. *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 790 n. 4 (2d Cir.1980), *cert. denied* 449 U.S. 1080, 101 S.Ct. 863, 66 L.Ed.2d 804 (1981).

Both subject matter jurisdiction and personal jurisdiction turn on application of the substantive provisions of the FSIA. If none of the exceptions to sovereign immunity set forth in the Act applies, the court lacks both statutory subject matter jurisdiction and personal jurisdiction. *Verlinden*, 461 U.S. at 485 n. 5 and 493, 103 S.Ct. at 1967 n. 5 and 1971. In determining whether the court has jurisdiction through application of one of the exceptions, the court must apply the detailed federal law standards set forth in the Act itself. *Id.* at 494, 103 S.Ct. at 1971.

III. *Absence of jurisdiction because of international law*

At the threshold China stands on the principle of absolute sovereign immunity as a fundamental aspect of its sovereignty. Its position is that under principles of international law it is immune from any suit in a domestic court of any other nation unless it consents. According to the United States' statement of interest:

> China's adherence to this principle results, in part, from its adverse experience with-extraterritorial laws and jurisdiction of western powers [within China] in the nineteenth and early twentieth centuries.

China asserts that restrictive sovereign immunity has not become a rule of international law, although in recent years some nations have begun to follow it, but these are, China says, only a small number of nations and by and large do not include developing countries, which find restrictive sovereign immunity not in their interest.

China contends that the United States cannot, by a change in its domestic law, abrogate the long accepted international law principle of absolute sovereign immunity. Even though restrictive sovereign immunity may be a developing customary rule of international law, China says that it is not binding upon sovereign states that do not agree with it. Thus, according to China, restrictive sovereign immunity is applicable only within the group of nations that have adopted it and is not applicable to China, which continues to adhere to the principle of absolute sovereign immunity. Finally, China contends that even if sovereign immunity can be changed by the United States, to apply the change retroactively would violate international law.

The district court did not rule on these international law questions, since it held that the suit was barred under United States domestic law. We follow the same course.

IV. *Setting aside the default*

The district court set aside the default judgment under Fed. R.Civ.P. 60(b), which provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Motions under Rule 60(b) are directed to the discretion of the trial court. The rule is equitable in origin, and the court

may take action appropriate to accomplish justice. *Klapprott v. U.S.*, 335 U.S. 601, 614-15, 69 S.Ct. 384, 390-91, 93 L.Ed. 1099 (1949). In the exercise of its discretion the trial court must carefully interpret the provisions of the rule to preserve the delicate balance between the sanctity of final judgments and the demands of justice. *Griffin v. Swim-Tech Corp.*, 722 F.2d 677 (11th Cir.1984).

We hold that the district court did not abuse its discretion in granting the PRC's motion under subsection (6) of Rule 60(b), which authorizes the court to set aside a judgment for all reasons except those set forth in the five preceding clauses. This subsection gives the courts ample power to vacate judgments whenever appropriate to accomplish justice. *Menier v. U.S.*, 405 F.2d 245 (5th Cir.1968); Moore's *Federal Practice* § 60.27[2]. Relief under this clause, however, is an extraordinary remedy, which may be invoked only upon a showing of exceptional circumstances. *Ackermann v. U.S.*, 340 U.S. 193, 200, 71 S.Ct. 209, 212, 95 L.Ed. 207, 212 (1950); *Griffin*, 722 F.2d at 680. This case presents extraordinary circumstances justifying the district court's exercise of its equitable discretion.

Until January 1, 1979 the United States recognized the Republic of China, not the PRC, as the sole government for all of China. After recognition of the PRC, and beginning as early as 1980, representatives of the State Department attempted to explain to the PRC that the issue of sovereign immunity in this case must be decided by the courts of the United States and could not be determined by the executive branch and that PRC should retain counsel to appear in the district court and urge sovereign immunity and any other defenses.

In 1983 the United States sent a delegation to Beijing, and six days of meetings ensued concerning major international matters. The Chinese leader Deng Xiaoping brought up the default judgment and indicated to Secretary of State Schultz that the PRC regarded it as a serious matter and a major irritant in bilateral relations with the United States. During 1983 the foreign minister of China presented the Secretary of State

with an *Aide Memoire* stating that the PRC recognized no obligation to pay external debts incurred by earlier Chinese governments and that the PRC enjoyed absolute sovereign immunity. In additional meetings in Washington and Beijing the United States sought to assure China that it could appear through counsel without conceding jurisdiction under the FSIA and without waiving its position that it enjoyed absolute immunity under international law. The PRC reluctantly agreed to retain counsel to present its views in court.

The United States explained in its statements that because of the long absence of relations between the United States and the PRC there were only limited communications between the two governments on legal matters, leaving PRC authorities generally unfamiliar with United States judicial practice and procedure; that the Chinese view the bonds as an improper part of the Western powers' domination of China at the beginning of this century and as a direct cause of the Revolution of 1911; and that the PRC maintains that under the principle of nonliability for "odious debts" China bears no responsibility for the bonds.

In its statements of interest the United States urged that the default be set aside. In support of this position, Secretary of State Shultz filed an affidavit, setting out *inter alia*:

> The United States has had extensive consultations with the PRC [People's Republic of China] about this case and is informed about its facts and history. The United States believes that the PRC's initial failure to appear in these proceedings was based on its belief that international law did not require it to do so. . . . The United States has expended considerable diplomatic efforts over the last two and one-half years to persuade the PRC that it is appropriate under international and United States law, and in the best interest of bilateral relations between the two nations, that the PRC appear and present its defenses to this Court. . . . Permitting the PRC to have its day in court will significantly further United States foreign policy interests; conversely denying it

that day in court is likely to have a negative impact on United States interests.

* * * * * *

The present proceedings, and the default judgment against the PRC in particular, have become a significant issue in bilateral United States/China relations, as evidenced by Chairman Deng's personal representations to me in February [1983], by China's representations to other Department officials throughout the duration of this lawsuit, and by the repeated diplomatic notes from the PRC that have been filed in these proceedings. The manner in which these proceedings are finally resolved can be expected, therefore, to have ramifications for other important United States interests with respect to China.

Also the district court had been notified by the PRC that if China's property in the United States was attached it reserved its right to take "corresponding measures."

We hold that the district court did not abuse its discretion in setting aside the judgment under Rule 60(b)(6). The district court correctly recognized that its Rule 60(b) power was discretionary and must be liberally construed to achieve substantial justice. It noted that the law disfavors default judgments. It pointed out, on the other hand, the desirability that final judgments not be lightly disturbed. And, it noted that where a defendant has meritorious defenses the interest in resolving the case on the merits prevails over the interest in finality of judgments. The PRC did have a defense — lack of subject matter jurisdiction.[2] In considering whether it should exercise its equitable discretion and whether extraordinary circumstances were involved, the court properly gave consideration to the Secretary of State's assessment of the foreign policy implications of the default judgment. Balancing all interests, the court found that it would be an abuse of discretion

[2]Arguably the default judgment was void since subject matter jurisdiction was lacking because of sovereign immunity. But we do not base our decision on this ground.

not to grant the motion under (4) and (6) of Rule 60.[3] We cannot fault this decision as to (b) (6).

Subsection (b) (4) provides that a judgment may be set aside because it is void. The court based its holding under this subsection on "the existence of pregnant questions relative to the jurisdiction of the Court." We do not need to address this ruling.

Transit Casualty Co. v. Security Trust Co., 441 F.2d 788 (5th Cir.1971), holding that 60(b) (1) and (b) (6) are mutually exclusive and that a reason for relief under (b) (1) cannot be a basis for relief under (b) (6), did not bar the court from acting under (b) (6). In *Transit Casualty* a litigant sought to proceed under (b) (6) for a mistake pure and simple. Here much more is involved than mistake, inadvertence, surprise, or excusable neglect. The concerns extend to the misconception by an ancient and proud sovereign of its responsibility to reply to the demands of a United States court whose authority it does not recognize as a matter of international law, at a time when concepts of United States law and international law are changing. The issues arise in the highly sensitive area of relations of our government with another sovereign with whom tolerable relations have been restored after many years. They affect not only the interests of the PRC but of our own nation. In *Transit Casualty* itself the district court had considered whether relief should be granted under the broad equitable powers of (b) (6) and had found no basis to exercise its discretion, and this court, despite the language it used, reviewed this finding and affirmed it.

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[3]The district court observed that, in ruling on the default issue, it was not passing on the ultimate issue of subject matter jurisdiction, which it later reached in another order. This was an appropriate approach. The court had jurisdiction to examine its jurisdiction. As an incident of that examination it was free to inquire whether the judgment previously entered was to be vacated so that it could examine the jurisdictional issue free of any inferences that might flow from the existence of the judgment. As the court put it, after describing the sovereign immunity and FSIA questions: "The interests of justice require that these jurisdictional questions be determined in the context of adversarial proceedings."

Plaintiffs urge that the PRC is not entitled to an exercise of equitable discretion under (b) (6) because it has not offered to do equity. The gist of their argument is that China is acting inequitably because it continues to insist that as a matter of international law it enjoys absolute sovereign immunity which the United States cannot abrogate without its consent. We reject out of hand the contention that in seeking an adjudication of jurisdictional issues arising out of United States domestic law China acts improperly in reserving what it conceives are its rights under international law.

V. *Jurisdiction under the FSIA*

In the district court, after the default was set aside, and before this court, the United States has asserted that the FSIA was not intended to apply to transactions that predate 1952.[4]

The district court held that the FSIA did not apply retroactively to confer subject matter jurisdiction in this case. The court originally concluded that *issuance* of the bonds was a "commercial activity" under § 1605 (a) (2). "Commercial activity" is defined in § 1603 (d). Later, after China appeared, the court expressed doubt about its conclusion, but, because of its holding of lack of jurisdiction, did not resolve the matter.

The district court made its analysis on the basis that the bonds matured in 1951. It considered general principles that militate against retroactive application of statutes. Against this background, the court examined three areas: the language of the statute, the legislative history, and the effect of retroactivity on antecedent rights of China. The court concluded that the Act itself contained no statement indicating that restrictive immunity was intended to apply to transactions that predated 1952. It noted, to the contrary, language of the Act that appeared to be prospective, "[c]laims of foreign states to immunity *should henceforth* be decided by courts of the United

[4]It has listed some six other cases pending in federal district courts asserting liability of foreign states for acts committed before 1952. These include suits against the USSR, Mexico, Poland and two against the PRC for bonds issued before 1920.

States in conformity with the principle set forth in this chapter." 28 U.S.C. § 1602. It noted further evidence of prospectivity in the provision for a 90 day delay period between enactment and effective date in order to give adequate notice to foreign nations of the United States' new policy of restrictive immunity. 28 U.S.C. § 1602 note "Effective Date."

The court examined the legislative history and found no support for retroactive application.

With respect to antecedent rights, the court noted that from 1911 to the date of maturity of the bonds in 1951 China relied on the expectation that the extant and almost universal doctrine of absolute sovereign immunity governed relations between China and the United States and between the citizens of the two countries. Concomitantly, China had no apprehension of being brought into court in the United States to answer for a default of the bond issue. Nor did the predecessors in interest of the bondholders' class have any expectation of any right to sue in the United States upon default. The court held that the statute should not be retroactively applied to alter antecedent rights unless it was the unequivocal import of its terms or the manifest intention of the legislators, a test set out in *Greene v. U.S.*, 376 U.S. 149, 160, 84 S.Ct. 615, 621, 11 L.Ed. 2d 576 (1964). It held the import of the terms and manifest intent of Congress to be to the contrary.

We agree with the district court's general approach to retroactivity. Courts normally presume that a legislative enactment is to apply prospectively, *Cox v. Schweiker*, 684 F.2d 310, 318 (5th Cir.1982), and the presumption is a strong one. *U.S. v. Security Industrial Bank*, 459 U.S. 70, 79, 103 S.Ct. 407, 413, 74 L.Ed.2d 235 (1982). We agree with the court's analysis of the language of the statute itself and of the legislative history. Indeed, both Senate and House Reports state that FSIA was not intended to affect the "substantive law of liability." S.Rep. No. 94-1310, 94th Cong., 2d Sess. 11 (1976); H.R.Rep. No. 94-1487, 94th Cong., 2d Sess. 12 (1976), U.S. Code Cong. & Admin. News 1976, p. 6610. We agree that to give the Act retrospective application to pre-1952 events would interfere with

antecedent rights of other sovereigns (and also with antecedent principles of law that the United States followed until 1952). It would be manifestly unfair for the United States to modify the immunity afforded a foreign state in 1911 by the enactment of a statute nearly three quarters of a century later.[5]

Our decision is consistent with the leading case on the issue of retroactivity of the jurisdiction-conferring section of FSIA, *Corporacion Venezolana de Fomento v. Vintero Sales,* 629 F.2d 786 (2d Cir.), *cert. denied* 449 U.S. 1080, 101 S.Ct. 863, 66 L.Ed.2d 804 (1980), in which a suit based on diversity was filed before the enactment of the FSIA. Jurisdiction was lacking, and after enactment of the FSIA the district court found that the FSIA supplied a basis for jurisdiction. The circuit court pretermitted the issue of whether Congress had power to confer jurisdiction in a pending case where none existed because "we cannot agree with the district court's view that Congress intended such retroactivity in the case of the FSIA." *Id.* at 791. The court focused upon the function of § 1330 as jurisdiction-conferring. It discussed *Andrus v. Charlestone Products,* 436 U.S. 604, 98 S.Ct. 2002, 56 L.Ed.2d 570 (1978), in which a case heard by the district court under an incorrect theory of subject matter jurisdiction was saved, in a jurisdictional sense, by enactment after the case began of a statute whose effect was to vest the court with jurisdiction. The mechanism was congressional elimination of the amount in controversy requirement in suits against the United States or its officers. The *Andrus* court held that this elimination created jurisdiction retroactively. The Second Circuit held that *Andrus* relied on the remedial purpose of the elimination of the amount in controversy and represented congressional correction of a "lacuna." In contrast, the court held passage of the FSIA was not to remedy a "lacuna" but rather was Congress' first codification of principles of sovereign immunity law. This

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[5]The decision we reach obviates consideration of China's contention that an interpretation giving the FSIA retroactive effect before 1952 would violate due process.

newly created jurisdiction was not intended to operate retroactively.

In *Venezolana* the district court had relied, as plaintiffs do, upon the language of the Act's preamble in § 1602, which states that "henceforth" cases should be decided in accordance with the principles of the FSIA. The circuit court rejected this, reading the language to mean only that decisions made henceforth should be governed by the substantive principles of immunity law adopted in the Act, and holding that the preamble did not purport to say anything about the retroactive application of the subject matter jurisdiction provisions in § 1330. Moreover, the court specifically recognized a "Congressional mandate to leave intact the *status quo ante* January 24, 1977 as respects rights of the parties." 629 F.2d at 790.

See also Martropico Compania Naviera S.A. v. Perusahaan [etc.], 428 F.Supp. 1035, 1037 (S.D.N.Y.1977) : "[I]t seems clear that regardless of the effect of the Immunities Act on the removal of pending state actions, the original jurisdiction of the federal courts is prospective only."

In *Venezolana* the Second Circuit distinguished *Yessenin-Volpin v. Novosti Press Agency*, 443 F.Supp. 849 (S.D.N.Y. 1978) on the ground that it had applied substantive principles of immunity embodied in § 1605 to a case filed before the effective date of the FSIA and had not addressed the jurisdiction-conferring aspects of the Act. It distinguished other cases that have addressed the § 1330 jurisdiction-creating section in the context of removal statutes, which are construed strictly and involve the necessity of giving weight to the extent to which the action has progressed in the court where it was initially brought, *Martropico, supra,* or in the context in which the presence of a grant of interim relief, such as attachment in rem, brought into play the congressional mandate to not interfere with the rights of parties pre-January 24, 1977, *e.g., Amoco Overseas Oil Co. v. Com. Nat. Algerienne de Navigation*, 459 F.Supp. 1242 (S.D.N.Y.1978), *aff'd* 605 F.2d 648 (2d Cir. 1979).

Since the district court's decision in the present case the District Court for the District of Columbia has reached the same result in *Slade v. the United States of Mexico,* 617 F.Supp. 351. The court concurred with *Jackson,* and then made the same analyses of the policy against retroactivity, legislative history, statutory language, and interference with antecedent rights, and reached the same result.

Plaintiffs rely upon *Verlinden,* but it upheld the constitutionality of the Act and remanded for the court of appeals to consider whether jurisdiction existed under the Act.

We find no case, and plaintiffs refer us to none, where the FSIA has been applied to confer subject matter jurisdiction over pre-1952 transactions, activities and events.

Plaintiffs have not contended that if the bonds were renegotiated in 1937 so as to mature in 1976, the existence of the bonds in the United States after 1952, the failure to make interest payments on them after 1952, and default on them in 1976, by themselves, are such activities and events that the sovereign immunity exceptions in § 1605 are triggered and § 1330 jurisdiction is created retroactively for the span of years back to 1952.[6] To the contrary, plaintiffs reject the possibility of retroactivity only back to 1952 and insist that retroactivity is all or none.[7] They say that the language of § 1602 and the legislative history confirm a congressional expectation that the immunity standards of the Act apply to all future cases without exception. They reject the concept of a "bifurcated practice" distinguishing between events after January 24, 1977 and suits arising from earlier events. Appellants Brief pp. 58-59. They repeat this position in their Reply Brief p. 31:

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[6]Plaintiffs assert that the court erred in finding that the renegotiations were not agreed upon. But this assertion is made in the context of an argument that the district court might have reached a different conclusion about jurisdiction relating to the 1911 issuance had it realized that the bonds did not mature until 1976.

[7]There would be, of course, a substantial question whether the post-1952 events just described, by themselves, assuming renegotiation, are within the commercial activity provisions of § 1605 (a) (2) and the definition of commercial activity in § 1603 (d).

The appellant's original brief points out at pages 58-64 that there is no authority to limit the retroactive application of the FSIA so long as the action was filed after adoption of the FSIA. There is certainly no authority to grant retroactivity, but then to limit it by an extraneous event, the date the Tate letter was written and published. The act is either retroactive or it is not.

The district court correctly held there was no subject matter jurisdiction over plaintiffs' claim.

AFFIRMED.

APPENDIX B

Order Of Eleventh Circuit Court Of Appeals Denying Petition For Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7744

RUSSELL JACKSON, et al; individually and on behalf of all other holders of five percent Hukuang Railways Bearer Bonds issued by the Imperial Chinese Govt in 1911, similarly situated,

Plaintiffs-Appellants,

versus

THE PEOPLE'S REPUBLIC OF CHINA, a foreign government,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 25, 11 Cir., 1986, ... F.2d ...).
(Sep 3, 1986)

Before GODBOLD, Chief Judge, JOHNSON, Circuit Judge, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing

en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ JOHN GODBOLD

United States Circuit Judge

APPENDIX C

Memorandum Opinion Of District Court Granting Default Judgment

Russell JACKSON, et al., Plaintiffs,

v.

The PEOPLE'S REPUBLIC OF CHINA,
a foreign government, Defendant.

No. 79-C-1272-E.

United States District Court,
N.D. Alabama, E.D.

Sept. 1, 1982.

MEMORANDUM OPINION

Plaintiffs, holders of certain bonds issued by the Imperial Chinese Government in 1911, brought this action against the People's Republic of China seeking payment of those bonds which are now in default. Plaintiffs filed suit pursuant to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1391 and 1602 et seq. (hereinafter "Immunities Act"). This case is presently before the Court on motion of plaintiffs for default judgment pursuant to Rule 55, F.R.C.P.

Historical and Factual Background

With more than 4,000 years of recorded history, China is one of the oldest countries in the world. Its civilization flourished economically and culturally in the earliest stages of world civilization. Until modern times, China's development had been independent of other countries because of the spirit of its people as well as its geography.

Imperial China was born in 221 B.C. with the institution of the rule of the first emperor of the Ch'in Dynasty. During the rise and fall of the different Chinese dynasties China made great strides in agricultural productivity, cultural development

and political unity. The political institutions of imperial China embodied a combination of Confucian Theory (characterized by respect for tradition, conventional social relationships and rule by benevolence) and Legalist practice (characterized by stern laws and severe punishments).

In the 16th century, during the Ming dynasty, drastic changes began to take place in China which would have far reaching effects on its insular nature. European explorers arrived in South China, followed by traders and missionaries. The importance of these events is that they heralded an end to China's isolation and the beginning of East-West contact.

China's preoccupation with tradition and its own cultural superiority made it reluctant to change in the face of western influence. However, its resistance was slowly dissipated, first by the acceptance of western technology. Its acceptance of and adoption of some western institutions was hastened by its defeat in the Sino-Japanese War (1894-1895) at the hands of an Asian country that had become more modernized than China. In the early 1900s, in a period known as the Manchu Reform Movement, China embraced modernization in earnest. One of the changes was the construction of a railway system in order to develop the economy, consolidate the defense system and strengthen national unification. The Hukuang Railway was a part of this expanding system.

In 1911, the Imperial Chinese Government sold, issued for sale and authorized the issuance for sale in the United States certain bearer bonds, more particularly described as follows:

The Imperial Chinese Government 5% Hukuang Railways Sinking Fund Gold Loan of 1911, First of a Series for 6,000,000 Pounds Sterling, each bond denominated in either 20 or 100 Pounds Sterling. Bonds of £20 each Nos. 1 to 2500 and Bonds of £100 each Nos. 70,151 to 84,650 are countersigned by or on behalf of the Hongkong and Shanghai Banking Corporation, Bonds of £100 each Nos. 84,651 to 93,650 are countersigned by or on behalf of the Deutsch-Assiatische Bank, Bonds of £20 each Nos. 32,501 to 70,000 and Bonds

of £100 each Nos. 93,651 to 101,150 are countersigned by or on behalf of the Banque de l'Indo-Chine and Bonds of £20 each Nos. 70,001 to 70,150 and Bonds of £100 each Nos. 101,151 to 116,120 are countersigned by or on behalf of Messrs. J. P. Morgan & Co., Messrs. Kuhn, Loeb & Co., The First National Bank of the City of New York, and the National City Bank of New York.

The proceeds from the sale of these bonds were used to build the final link in the north-south railway system. This link, the Hukuang Railway, connects Beijing, formerly Peking, and the port city of Canton. Prior to the completion of this railway, goods were transported either over land on poor roads or circuitously by sea and the Yellow and Yangtze Rivers which run east-west. Consequently, the Hukuang Railway was a major step forward for fast and efficient transportation between north and south. It is still in operation as an integral part of China's railway system.

The 5% Hukuang Railway Bonds provide, among other things, that

> The Bearer of this Bond is entitled to receive from the Imperial Government of China the principal sum of £100 Sterling (or, on £20 Bonds, £20 Sterling) on the 15th day of June 1951 with interest thereon until repayment at the rate of five percent per annum, payable half-yearly on the 15th day of December and the 15th day of June in each year in accordance with the coupons attached hereto. . . .
>
> The interest on this Bond will be payable on the surrender of the proper coupons hereto annexed. If redeemed the principal of this Bond with premium (if any) will be payable at or after the redemption date, on the surrender of this Bond with all coupons thereon not then due; if not redeemed, the principal will be payable at or after the due date on surrender of this Bond. All interest will cease on the principal becoming payable and provision having been made for its payment, whether the Bond shall be presented

for payment or not. All payments of principal and interest on this Bond will be made in London in Sterling money of Great Britain at the office of the Hongkong and Shanghai Banking Corporation or (at the current rate of Sterling exchange of London on the day of presentation) in Berlin in Reichmarks at the office of the Deutsch-Asiatisch Bank, in Paris in Francs at the office of the Banque de l'Indo-Chine, and in New York in Dollars at the offices of Messrs. J. P. Morgan and Co., Messrs. Kuhn, Loeb & Co., The First National Bank of the City of New York and the National City Bank of New York, and such other offices in London, Germany, France and New York, respectively, as shall be notified by advertisement by the said respective Banks or Bankers. The Imperial Government of China pursuant to an Imperial Edict, dated the 20th May, 1911, hereby engages that the principal moneys and interest hereby secured shall duly be paid in full, and it further declares that this Bond and its Coupons and all payments made and received in connection therewith are exempt from all Chinese taxes and imports.

In 1912, shortly after the Hukuang bonds were issued, a revolutionary movement culminated in the replacement of the Imperial Chinese Government by the Republic of China. The government made timely interest payments on the Hukuang bonds until December 15, 1930. After that date, only two other interest payments were made. These were half interest payments made on June 15, 1937 and June 15, 1938.

In the spring of 1937, the government of the Republic of China which was then led by Chiang Kai-shek, offered a compromise program to honor the Hukuang bonds. The government sought to extend the due date on the principal value of the bonds from June 15, 1951 until June 15, 1976. The compromise program was never assented to by the bondholders and was never carried out by the government because of the outbreak of the Sino-Japanese War in July, 1937.

The war with Japan continued until it announced its willingness to surrender in 1945. From that point until 1949,

China was wracked with the turmoil of a civil war as the Communist Party of China fought to take control of mainland China. On August 13, 1947, the prime minister of the national government issued the following statement relative to the Hukuang bonds:

> China pledges her honourable intention to repay those external loans the service of which was suspended in the course of the Sino-Japanese war. In no way does the conclusion of new loans in recent years prejudice the security of these pre-war loans or vitiate the rights of holders of such bonds. At the same time, China hopes soon to start a progressive programme of debt rehabilitation in accordance with the policy of upholding the national credit. Like so many other post-war nations today, China will yet need international economic assistance to rehabilitate her trade and industry so as to strengthen her ability to make debt payments. Nevertheless, the National Government is determined to do its best to fulfill its obligations and sincerely hopes that financial conditions will soon show sufficient improvement to enable it to make arrangements for an early resumption of the service of pre-war loans. (Plaintiffs' Exhibit 6).

The Communist party seized control of China in 1949 and established the People's Republic of China. The former national government withdrew to Taiwan.

It is an established principle of international law that "[c]hanges in the government or the internal policy of a state do not as a rule affect its position in international law. A monarchy may be transformed into a republic, or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired." *Lehigh Valley R. Co. v. State of Russia*, 21 F.2d 396, 401 (2d Cir. 1927) (quoting Moore, Digest International Law, vol. 1, p. 249). The People's Republic of China is the successor government to the Imperial Chinese Government and, therefore, the successor to its obligations. The People's Republic of China

has made no provision for payment of the principal due on the Hukuang bonds.

Jurisdiction

Under 28 U.S.C. § 1330(a), this Court has subject matter jurisdiction without regard to the amount in controversy over any nonjury civil action against a foreign state, agency or instrumentality as to any claim for relief with respect to which the foreign state or agency is not entitled to immunity. The People's Republic of China is a foreign state within the meaning of the Immunities Act and is not entitled to immunity from suit by virtue of 28 U.S.C. § 1605(a), which provides as follows:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> (2) in which the action is based upon a commercial activity carried on in the United States by a foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. . . .

A "commercial activity carried on in the United States by a foreign state" is defined as a "commercial activity carried on by such state and having substantial contact with the United States." *Id.* § 1603(e). "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to purpose." *Id.* 1603(d).

It is clear that the sale, issuance for sale and authorization of issuance for sale in the United States constitutes a "commercial activity" carried on in the United States by a foreign

state. *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3rd Cir. 1980); *Behring Intern. v. Imperial Iranian Air Force*, 475 F. Supp. 383 (NJ 1979). Therefore, the defendant is not entitled to the general immunity granted to foreign states under 28 U.S.C. § 1604 with respect to the bonds which are the basis of this suit.

Having established subject matter jurisdiction, this Court may exercise jurisdiction over the defendant provided service of process is made in strict compliance with 28 U.S.C. § 1608. Service was made upon the People's Republic of China pursuant to 28 U.S.C. § 1608(a)(4) which states that

> if service cannot be made within 30 days under paragraph (3) [(service by mail), service shall be made] by sending two copies of the summons and complaint and a notice of suit,[1] together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services – and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note[2] indicating when the papers were transmitted.

The Office of Special Consular Services sent to the Clerk of this Court a certified copy of the diplomatic note indicating that the summons, complaint and notice of suit were transmitted to the Embassy of the People's Republic of China in

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[1]A "notice of suit" is described fully at 22 C.F.R. § 93.2 (1981). The same section applies to notice of a default judgment.

[2]A diplomatic note of transmittal must accompany documents delivered under 22 C.F.R. § 93.1(c). The note, which is prepared by the Office of Special Consular Services, merely requests that the documents be forwarded to the foreign state's appropriate authority. It also informs the foreign state that questions of jurisdiction and immunity must be addressed to the court and not to the Department of State and advises that an attorney in the United States be consulted.

Washington, D.C. on May 16, 1980. Service is deemed to have been made as of the date of transmittal. Therefore, service of process was made on the People's Republic of China even though its embassy returned all of the documents to the Director of Special Consular Services approximately one month later.

Class Action

On October 22, 1981, this Court certified this action as a class action consisting of all persons who, on the date of the order, were holders of the Hukuang Railway bonds which are the basis of this suit. On the same date, the Court found that the People's Republic of China had failed to appear or to answer plaintiffs' complaint within the time allowed by law and that the time for answering or appearing had expired. Accordingly, a default was entered against the defendant and in favor of the plaintiff class.

The Court ordered plaintiffs' lead counsel, W. Eugene Rutledge, to mail an approved notice to all known class members and to specified brokerage houses and to publish said notice in the *Wall Street Journal* and *Barrons*. Copies of the orders certifying this as a class action and entering a default were served upon the Embassy of the People's Republic of China in the same manner as the summons, complaint and notice of suit were served. The Embassy returned these documents to the United States Department of State.

Default Judgment

Section 1608(e) provides that no default judgment shall be entered against a foreign state "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." This is the same rule that applies to entry of default judgments against the United States. F.R.C.P. 55(e). By its order of October 22, 1981, this Court, on the basis of plaintiffs' motion, brief and testimony, found that the People's Republic of China failed to appear or plead within the requisite time and was, therefore, in default. The defendant received notice

of this order by "notice of entry of default" on December 10, 1981. At the same time, the defendants were advised that they had sixty days after receipt of the documents within which to ask the Court to set the default aside. Rule 55(c), F.R.C.P., does not set a specific time for setting aside a default. However, courts have held that the moving party must act with reasonable promptness. *See, e.g., Consolidated Masonry & Fireproofing, Inc. v. Wagman Construction Corp.*, 383 F.2d 249 (4th Cir.1967) (two and one-half months was not reasonably prompt). Not only has the People's Republic of China refused to avail itself of the legal procedures available to set aside entry of default, it has returned all documents sent to it and has indicated that it will not be a party to this suit. Under the circumstances, the plaintiff class is entitled to and this Court has the authority to enter a judgment of default against the People's Republic of China.

In light of the preceding discussions, it is clear that plaintiffs are entitled to payment of all unpaid interest and principal on the Hukuang bonds. The only issue remaining then is the determination of plaintiffs' damages.

Damages

A hearing was held before this Court on March 29, 1982, to determine the amount of damages. Expert testimony was presented to the Court concerning the method by which calculations should be made to determine the amounts due in unpaid principal and interest. A calculation table prepared by the expert witness who testified at the hearing of this case is attached to this Memorandum Opinion as Exhibit A. These calculations were made as follows: The exchange rate from British Pounds to United States Dollars was ascertained,[3] using figures provided by the United States Federal Reserve Bank, for each date on which an interest payment or coupon was due. Interest earned on each coupon payment after its due date is then cal-

[3]The bonds specify that payment of interest and principal is to be made in British Pounds Sterling.

culated at 5% simple interest. The principal amount due June 15, 1951, is converted at the then applicable exchange rate of 2.80626 Dollars per Pound Sterling to equal a principal payment due on that date of $280.63. Addition of all coupon payments so calculated plus the final payment of principal yields a sum of $1,009.58 due for each 100 Pound bond on June 15, 1951. Simple interest at 5% annually is then calculated on this amount of $1,009.58 beginning after June 15, 1951, up through the date of the hearing before this Court on March 29, 1982, to arrive at a total figure of $4,617.22 for each 100 Pound bond. Each 20 Pound bond is worth one-fifth of that value, or, $923.44.

On the basis of the foregoing, a default judgment will be entered in favor of plaintiffs in an amount representing $4,617.22 for each 100 Pound bond properly claimed in this action and $923.44 for each 20 Pound bond properly claimed in this action. A separate order embodying these conclusions shall issue.

DONE this 1st day of September, 1982.

/s/ U. W. CLEMON

United States District Judge
U. W. Clemon

EXHIBIT A

Cumulated Unpaid Interest and Principal Due on Hukuang Railway 5% £ 100 Gold Bond

Date	Dollar Value of British Sterling Payment Due (Interest: 2½)		Interest Earned During Past Six Months at Five Percent Yearly	Total Dollars Due But Unpaid
	£1 =			
December 15, 1930	$4.86	$12.15	—	$12.15
June 15, 1931	4.86	12.15	.30	24.60
December 15, 1931	3.43	8.58	.62	33.80
June 15, 1932	3.67	9.18	.85	43.83
December 15, 1932	3.29	8.23	1.10	53.16
June 15, 1933	4.09	10.23	1.33	64.72
December 15, 1933	5.09	12.73	1.62	79.07
June 15, 1934	5.05	12.63	1.98	93.68

EXHIBIT A — Continued

Cumulated Unpaid Interest and Principal Due on Hukuang Railway 5% £ 100 Gold Bond (Continued)

Date	Dollar Value of British Sterling Payment Due (Interest: 2½)		Interest Earned During Past Six Months at Five Percent Yearly	Total Dollars Due But Unpaid
December 15, 1934	4.94	12.35	2.34	108.37
June 15, 1935	4.94	12.35	2.71	123.43
December 15, 1935	4.93	12.33	3.09	138.85
June 15, 1936	5.03	12.58	3.47	154.90
December 15, 1936	4.91	12.28	3.87	171.05
June 15, 1937	(4.94)	Paid.	4.28	175.33
December 15, 1937	5.00	12.50	4.38	192.21
June 15, 1938	(4.97)	Paid.	4.81	197.02
December 15, 1938	4.67	11.68	4.93	213.63
June 15, 1939	4.68	11.70	5.34	230.67
December 15, 1939	3.95	9.88	5.77	246.32
June 15, 1940	3.69	9.23	6.16	261.71
December 15, 1940	4.04	10.10	6.54	278.35
June 15, 1941	4.03	10.08	6.96	295.39
December 15, 1941	4.04	10.10	7.38	312.87
June 15, 1942	4.04	10.10	7.82	330.79
December 15, 1942	4.04	10.10	8.27	349.16
June 15, 1943	4.04	10.10	8.73	367.99
December 15, 1943	4.04	10.10	9.20	387.29
June 15, 1944	4.04	10.10	9.68	407.07
December 15, 1944	4.04	10.10	10.18	427.35
June 15, 1945	4.04	10.10	10.68	448.13
December 15, 1945	4.03	10.08	11.20	469.41
June 15, 1946	4.03	10.08	11.74	491.23
December 15, 1946	4.03	10.08	12.28	513.59
June 15, 1947	4.03	10.08	12.84	536.51
December 15, 1947	4.03	10.08	13.41	560.00
June 15, 1948	4.03	10.08	14.00	584.08
December 15, 1948	4.03	10.08	14.60	608.76
June 15, 1949	4.03	10.08	15.22	634.06
December 15, 1949	2.80	7.00	15.85	656.91
June 15, 1950	2.80	7.00	16.42	680.33
December 15, 1950	2.80	7.00	17.01	704.34
June 15, 1951	2.80625	7.00	17.61	728.95
£ 100 at	2.80625 = 280.63			1,009.58

EXHIBIT A – Continued

Cumulated Unpaid Interest and Principal Due on Hukuang Railway 5% £ 100 Gold Bond (Continued)

Date	Interest Earned During Past Six Months at Five Percent Yearly	Total Dollars Due But Unpaid
December 15, 1951	25.24	1,034.82
June 15, 1952	25.87	1,060.69
December 15, 1952	26.52	1,087.21
June 15, 1953	27.18	1,114.39
December 15, 1953	27.86	1,142.25
June 15, 1954	28.56	1,170.81
December 15, 1954	29.27	1,200.08
June 15, 1955	30.00	1,230.08
December 15, 1955	30.75	1,260.83
June 15, 1956	31.52	1,292.35
December 15, 1956	32.31	1,324.66
June 15, 1957	33.12	1,357.78
December 15, 1957	33.94	1,391.72
June 15, 1958	34.79	1,426.51
December 15, 1958	35.66	1,462.17
June 15, 1959	36.55	1,498.72
December 15, 1959	37.47	1,536.19
June 15, 1960	38.40	1,574.59
December 15, 1960	39.36	1,613.95
June 15, 1961	40.35	1,654.30
December 15, 1961	41.36	1,695.66
June 15, 1962	42.39	1,738.05
December 15, 1962	43.45	1,781.50
June 15, 1963	44.54	1,826.04
December 15, 1963	45.65	1,871.69
June 15, 1964	46.75	1,918.44
December 15, 1964	47.96	1,966.40
June 15, 1965	49.16	2,015.56
December 15, 1965	50.39	2,065.95
June 15, 1966	51.64	2,117.59
December 15, 1966	52.94	2,170.53
June 15, 1967	54.26	2,224.79
December 15, 1967	55.62	2,280.41
June 15, 1968	57.01	2,337.42
December 15, 1968	58.44	2,395.86
June 15, 1969	59.90	2,455.76
December 15, 1969	61.39	2,517.15
June 15, 1970	62.93	2,580.08
December 15, 1970	64.50	2,644.58
June 15, 1971	66.11	2,710.69
December 15, 1971	67.77	2,778.46

EXHIBIT A — Continued

Cumulated Unpaid Interest and Principal Due on Hukuang Railway 5% £ 100 Gold Bond (Continued)

Date	Interest Earned During Past Six Months at Five Percent Yearly	Total Dollars Due But Unpaid
June 15, 1972	69.46	2,847.92
December 15, 1972	71.20	2,919.12
June 15, 1973	72.98	2,992.10
December 15, 1973	74.80	3,066.90
June 15, 1974	76.67	3,143.57
December 15, 1974	78.59	3,222.16
June 15, 1975	80.55	3,302.71
December 15, 1975	82.57	3,384.28
June 15, 1976	84.63	3,468.91
December 15, 1976	86.72	3,555.63
June 15, 1977	88.89	3,644.52
December 15, 1977	91.11	3,735.63
June 15, 1978	93.39	3,829.02
December 15, 1978	95.73	3,924.75
June 15, 1979	98.12	4,022.87
December 15, 1979	100.57	4,123.44
June 15, 1980	103.09	4,226.53
December 15, 1980	105.66	4,332.19
June 15, 1981	108.30	4,440.49
December 15, 1981	111.01	4,551.50
October 22, 1981		$4,520.02
March 29, 1982		$4,617.22

APPENDIX D

Order Of District Court Granting Default Judgment

Russell JACKSON, et al., Plaintiffs,

v.

The PEOPLE'S REPUBLIC OF CHINA,
a foreign government, Defendant

No. 79-C-1272-E.

United States District Court, N.D. Alabama, E.D.

Sept. 1, 1982.

JUDGMENT

Defendant, The People's Republic of China, has defaulted in this action. Its default was entered on October 22, 1981. The issue of the amount of damages sustained by the plaintiff class was submitted to the Court and the Court determined that plaintiffs suffered damages in the amount of Forty-One Million, Three-Hundred Thirteen Thousand, Thirty-Eight Dollars and 00/100 Cents ($41,313,038.00).

Pursuant to and in accordance with the Memorandum Opinion entered contemporaneously herewith, it is, therefore,

ORDERED, ADJUDGED and DECREED that plaintiffs recover the sum of $41,313,038.00 with interest thereon at the legal rate from and after the 1st day of September, 1982, together with costs of this action.

DONE this 1st day of September, 1982.

/s/ U. W. CLEMON

United States District Judge
U. W. Clemon

APPENDIX E

Order Of District Court Setting Aside Default Judgement

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

RUSSELL JACKSON, et. al.,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION NUMBER 79-C-1272-E
THE PEOPLE'S REPUBLIC OF CHINA, a foreign government,	)	
Defendant.	)	

ORDER

In conformity with the accompanying Memorandum of Opinion, it is hereby ORDERED that:

1. The defendant People's Republic of China's Motion For Relief From Judgment By Default is hereby GRANTED; and the October 21, 1981, September 2, 1982, and November 17, 1982 orders and judgments of this Court are hereby SET ASIDE and held for naught.

2. The plaintiffs' Motion For Order Under 28 U.S.C. § 1610 is hereby OVERRULED.

3. Upon the written request of either of the parties, filed no later than March 12, 1984, the Court shall conduct an evidentiary hearing on defendant's Motion to Dismiss, at a date and time to be hereafter set by the Court. In the absence of such a request, the defendant's Motion to Dismiss shall be deemed submitted to the Court as of March 13, 1984.

DONE this 27th day of February, 1984.

/s/ U. W. CLEMON

United States District Judge
U. W. Clemon

APPENDIX F

Memorandum Of District Court Setting Aside Default Judgement

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

RUSSELL JACKSON, et. al.,	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL ACTION
	)	NUMBER
THE PEOPLE'S REPUBLIC OF CHINA, a foreign government,	)	79-C-1272-E
Defendant.	)	

By a timely and appropriate motion under Fed.R.Civ.P. 60 (b), the defendant People's Republic of China ("China") seeks relief from the default judgments entered against her by this Court on October 21, 1981, September 2, 1982, and November 17, 1982.[1] The plaintiff class has also moved for an order declaring that it may now commence attachment or execution proceedings against China based on the default judgment, pursuant to 28 U.S.C. § 1610. For the reasons stated herein, the Court concludes that the interests of justice and the public interest require that China be relieved of the default judgments. The motion of the plaintiff class is accordingly due to be dismissed as moot.

Alleging jurisdiction under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1391, and 1602 *et seq.*, plaintiffs filed this action in this Court on November

[1]The default judgment was entered by the Court on October 21, 1981; on September 21, 1982, the Court ordered that the plaintiff class recover $41,313,038.00 from China; and on November 17, 1982, the amount of the judgment was increased to cover the claim of Jeff Saile, an unnamed member of the certified class.

13, 1979. The case arises out of the issuance of certain bearer bonds by the Imperial Chinese Government in 1911, and the subsequent default of the bond issue. In late September, 1980, the Clerk of this Court was informed by office of Secretary of State that China had been served with the appropriate papers.[2] China did not appear or answer within the next twelve months. On September 25, 1981, plaintiffs moved for the entry of default; and on October 21, the Court granted the motion.

A hearing on the claim for damages was held by the Court in March, 1982. Evidence was adduced by plaintiffs at this hearing; but again, China did not appear and it was unrepresented at the hearing. Based on the evidence received at the hearing, and the briefs and arguments of counsel for the plaintiff class, the Court found that it had subject matter jurisdiction; that China had been properly served with process; and that the plaintiff class was entitled to payment of all unpaid interest and principal on the defaulted bonds.

It was not until August 12, 1983, that China entered a special appearance and sought to have the default judgments set aside and the case dismissed.

Rule 60(b) provides, in pertinent part,

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect, ... (4) the judgment is void; . . . . or (6) any other reason justifying relief from the operation of the judgment.

A motion for relief from judgment under Rule 60(b) is addressed to the sound discretion of the trial court. However, the court's discretion is not unbridled; it is circumscribed by several considerations: First, since the rule is remedial in nature, it must be liberally construed in order to achieve substantial justice. Equally important, the trial court should be mindful of the law's disfavor for default judgments. Further, where the

[2]As discussed in this opinion, China asserts that the service was defective under FSIA.

motion for relief is timely filed and a meritorious defense is shown, any doubts should be resolved in favor of the motion so that the case may be resolved on its merits. *Schwab v. Bullock's Inc.*, 508 F.2d 353 (9th Cir. 1974). On the other hand, it is highly desirable that final judgments be final, and they should not lightly be disturbed. Wright & Miller, Federal Practice and Procedure: Civil § 2857. But where a defendant has several meritorious defenses, the interest in resolving the case on the merits prevail over the interests in finality of judgments. The court should consider all factors relevant to the justice of the judgment under attack, including that of whether intervening equities would make it inequitable to deny relief. *Seven Elves v. Eskenazi*, 635 F.2d 396 (5th Cir. 1981).

Under the law of our circuit, Rule 60(b) is ". . . a grand reservoir of equitable power to do justice in a particular case. . . ." *Menier v. United States*, 405 F.2d 245, 248 (5th Cir. 1968). That reservoir ". . . may be tapped by the district court in the sound exercise of its discretion, and within the strictures inherent in the underlying objectives of the rule." *Seven Elves, supra*, at 402. Where a denial of relief under Rule 60(b) precludes examination of the full merits of the case, even a slight abuse of the trial court's discretion will require reversal. *Bridoux v. Eastern Airlines, Inc.*, 214 F.2d 207, 210 (D.C. Cir. 1954); *Seven Elves, supra*.

Under these principles, it is clear that a denial of China's Rule 60(b) motion, insofar as it is predicated on subsections (4) and (6) of the Rule[3] would be an abuse of discretion.

The Soundness *Vel Non* of the Judgment

While the Court does not in this opinion pass on the ultimate question of subject matter jurisdiction *vel non*, suffice it to say that the jurisdiction of this Court has been seriously called into question. China points out that at the time the Hukuang bonds were issued in 1911, absolute sovereign immu-

[3]The Court does not find that China is entitled to relief because of "mistake, inadvertence, surprise, or excusable neglect."

nity was a basic tenet of international law — and the principle was then recognized by both the United States and the Imperial government of China. While the United States, through the FSIA, has relaxed the doctrine, many of the nations of the world, notably the socialist nations, have not done so. Unless FSIA applies retroactively, the principle of absolute sovereign immunity would bar this action altogether. At this point, it is unclear to the Court whether Congress intended that FSIA would apply to transactions such as the one *sub judice*, occurring sixty-five years prior to its enactment. Assuming that Congress did so intend, China properly notices that an equally troublesome question is presented: Does the FSIA, as applied to the 1911 Hukuang bond issue, violate any due process rights of China?

The interests of justice require that these jurisdictional questions be determined in the context of adversarial proceedings.

China also asserts that the issuance of the Hukuang bonds by a predecessor government was not a "commercial activity," within the meaning of 28 U.S.C. § 1605 (a) (2). In the earlier phase of these proceedings, which were essentially *ex parte* due to China's failure to appear, the Court reached the opposite conclusion. Upon consideration of China's briefs and arguments,[4] the issue is not as clear as the Court once thought,[5] and it should be reconsidered by the court.

As this Court noted in its 1982 Memorandum Opinion, *in personam* jurisdiction over China may be had only if service of process has been effectuated in strict compliance with 28 U.S.C. § 1608. Among other things, § 1608 (a) (4) requires that

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[4]From the point of view of the People's Republic of China, and in the historical context of the period, the bond issue was certainly something more than a commercial activity. Moreover, there is authority for a narrow definition of the term. *Internat'l Assn of Machinists v. OPEC*, 477 F.Supp. 553, 567, (C.D. Cal., 1979).

[5]Substantial authority exists for the position that the loan was indeed a commercial activity. *Texas Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300; *Gibbons v. Udaras na Gaeltachta*, 549 F.Supp. 1094 (S.D. N.Y. 1982); *Letelier v. Republic of Chile*, C.A. No. M18-302 (S.D. N.Y., decided July 28, 1983).

the summons and complaint be translated into the official language of the foreign state. China now claims that the summons was not translated into Chinese, that the translation was erroneous in several material respects, and that the plaintiffs' Chinese translation of the relevant documents utilize certain handwritten classical Chinese characters (which are no longer a part of the official written language of China) rather than simplified characters. The Court would not set aside the judgment based on the latter two grounds;[6] but the absence of direct evidence that the summons was translated into Chinese stands on a different footing. The burden is on the plaintiffs to show that they have complied with this requirement; and the Court is not satisfied that they have carried that burden.

There is no basis for China's assertion that plaintiffs did not establish their claim or right to relief "by evidence satisfactory to the Court," as required by § 1608(e) of FSIA.[7]

Because of the existence of pregnant questions relating to the jurisdiction of the Court, the default judgment should be set aside under Fed.R.Civ.P. 60(b)(4).

The Public Interest

As noted earlier, Rule 60(b)(6) authorizes relief from judgment for ". . . any other reason justifying relief from the operation of the judgment."

In this case, the United States has effectively intervened to urge that the default be set aside. In support of this position,

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[6]Despite the alleged errors in translation, China was sufficiently informed of the nature of the claims so that she apparently does not require a More Definite Statement of plaintiffs' claims. China has not asserted that the use of classical characters made the service papers incomprehensible; and classical characters indubitably remain a part of the official language of China.

[7]The Court disagrees with the proposition that in the earlier proceedings, it should have *sua sponte* raised the statute of limitations defense and dismissed the case on that basis. It is hornbook American law that the bar of statute of limitations is an affirmative defense; and that if it is not raised by a defendant, it is waived. 51 Am Jur 2d, Limitation of Actions, § 457.

Secretary of State George P. Shultz has filed an affidavit in which he asserts, *inter alia*:

> The United States has had extensive consultations with the PRC [Peoples Republic of China] about this case and is informed about its facts and history. The United States believes that the PRC's initial failure to appear in these proceedings was based on its belief that international law did not require it to do so. . . . The United States has expended considerable diplomatic efforts over the last two and one-half years to persuade the PRC that it is appropriate under international and United States law, and in the best interest of bilateral relations between the two nations, that the PRC appear and present its defenses to this Court. . . . Permitting the PRC to have its day in court will significantly further United States foreign policy interests; conversely denying it that day in court is likely to have a negative impact on United States interests.
>
> . . .
>
> The present proceedings, and the default judgment against the PRC in particular, have become a significant issue in bilateral United States/China relations, as evidenced by Chairman Deng's personal representations to me in February [1983], by China's representations to other Department officials throughout the duration of this lawsuit, and by the repeated diplomatic notes from the PRC that have been filed in these proceedings. The manner in which these proceedings are finally resolved can be expected, therefore, to have ramifications for other important United States interests with respect to China.

The Secretary's assessment of the foreign policy implications of this action is due considerable deference.

Of course, this Court has never denied China her day in court; it was instead China's repeated failure to appear that precipitated the default proceedings and judgment. Be that as it may, the fact is that a failure to set aside the default judgment may adversely impact on important and delicate United States-Sino relations. The public interest therefore requires that the Court's discretion be exercised in favor of setting aside the default and adjudicating the untimely-filed defenses of China.

For this reason, independent of the Rule 60(b) (4) considerations, China's motion will be granted under Rule 60(b) (6).

Conclusion

The Court is not unmindful of the burden imposed on the plaintiff class by its decision to set aside the default judgment. But in the Court's view, it has no other alternative — for there are serious questions as to its subject matter jurisdiction and the adequacy of service of process. Moreover, the public interest clearly requires that the default judgment be set aside and that the defenses of China be heard on their merits.

In the absence of the filing, within fourteen days, of a request by either party to adduce further evidence, the Court will treat China's pending motion to dismiss as a motion for summary judgment and the motion will be deemed submitted.

DONE this 27th day of February, 1984.

/s/ U. W. CLEMON

United States District Judge
U. W. Clemon

APPENDIX G

Order Of District Court Dismissing Action

Russell JACKSON, et al., Plaintiffs,

v.

The PEOPLES'S REPUBLIC OF CHINA,
a foreign government, Defendant.

Civ. A. No. 79-C-1272-E.

United States District Court, N.D. Alabama, E.D.

Oct. 26, 1984.

MEMORANDUM OF OPINION

CLEMON, District Judge.

The plaintiffs instituted this action on November 13, 1979 seeking payment of certain bearer bonds, now in default, which were issued by the Imperial Chinese Government in 1911. The jurisdiction of the Court was invoked under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1391 and 1602 *et seq*. A default judgment was entered against the defendant, the People's Republic of China (China) on October 21, 1981 due to China's failure to appear or answer. Damages were subsequently awarded in 1982. 550 F.Supp. 869.

In August of 1983, China made a special appearance requesting the Court to set aside its entry of default judgment. On February 27, 1984, following a hearing on the issue, this Court entered an order pursuant to Rule 60(b) of the Fed.R.Civ.P. which set aside the default judgment against China. Noting that the controversy was fraught with jurisdictional issues and mindful of the far reaching ramifications that the ultimate decision could have on Sino-American relations, the Court found that justice and the public interest dictated that the default judgment be set aside.

The case is now before the Court upon China's motion to dismiss. In support of its motion, China alleges that the FSIA,

which was enacted in 1976, does not retroactively apply to a cause of action arising out of a 1911 transaction.

The law is clear that the FSIA is the exclusive basis for jurisdiction in this case. *Ruggiero v. Compania Peruana de Vapores,* 639 F.2d 872, 875-76 (2nd Cir.1981); *Rex v. Compania Pervana de Vapores,* 660 F.2d 61, 65 (3rd Cir.1981), *cert. denied,* 456 U.S. 926, 102 S.Ct. 1971, 72 L.Ed.2d 441 (1982); *Williams v. Shipping Corp. of India,* 653 F.2d 875, 880-81 (4th Cir.1981), *cert. denied,* 445 U.S. 982, 102 S.Ct. 1490, 71 L.Ed. 2d 691 (1982); *Goar v. Compania de Vapores,* 688 F.2d 417 (5th Cir.1982); *McKeel v. Islamic Republic of Iran,* 722 F.2d 582 (9th Cir.1983).

Therefore, the question of the retroactive application of the statute is dispositive of the case, if the statute is found to be prospective only.[1] In that situation, the case must be dismissed for want of jurisdiction.

I.

Courts generally look unfavorably upon the retroactive application of statutes. In the landmark case of *Union Pac. R. Co. v. Laramie Stock Co.,* 231 U.S. 190, 34 S.Ct. 101, 58 L.Ed. 179 (1913) the Supreme Court pronounced the basic tenet governing the application of statutes as follows:

> . . . The first rule of construction is that legislation must be considered as addressed to the future and not to the past. The rule is one of obvious justice . . . [and] has been expressed in varying degrees of strength, but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislation." [quoting *United States v. Heth,* 3 Cranch 399, 413, 2 L.Ed. 479, 483].

231 U.S. at 199, 34 S.Ct. at 102.

[1]Inasmuch as the question of retroactivity is dispositive, the Court finds it unnecessary to address the other issues which were also raised by China.

It is equally well established that the rights of a party pursuant to a contractual agreement are determined by the law existing when the contract was made. "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." *Home Building and Loan Association v. Blaisdell,* 290 U.S. 398, 435, 54 S.Ct. 231, 239, 78 L.Ed. 413 (1934).

These controlling principles dictate that the Court determine whether retroactive application would encroach upon notions of fairness and justice by interfering with China's legitimate expectations based upon the existing law at the times relevant to this controversy.

Historicallly, the doctrine of absolute immunity was internationally recognized as the policy governing the acts of a foreign state. The American doctrine of absolute sovereign immunity was enunciated as early as 1812 by the United States Supreme Court in the bulwark case of *The Schooner Exchange v. McFadden,* 7 Cranch 116, 3 L.Ed. 287 (1812). This doctrine remained indubitably intact, as a basic tenet of American law when the Hukuang Railway Bonds were issued in 1911; it continued to be the law of our country until the date of the maturity of the bonds in 1951.[2]

The doctrine of absolute immunity slowly began to lose momentum in the thirties and forties and it eventually gave way in 1952. At that time the United States Department of State adopted the standard of restrictive sovereign immunity as the official policy of the United States. 26 Dept. State Bull. 984 (1952) (the "Tate Letter"). This theory provided that a foreign sovereign was immune from jurisdiction with respect to its public acts (*jure imperii*) but not as to its private acts (*jure gestionis*).

[2]In the Spring of 1937, the government of the Republic of China offered to extend the date of the maturity of the bonds from June 15, 1951 until June 15, 1976. This arrangement, however, was not mutually agreed upon and its implementation was further impeded by the outbreak of the Sino-Japanese War in July of 1937.

Finally, in 1976, the policy of restrictive sovereign immunity as embodied in the Tate Letter was codified by the enactment of the FSIA.

The foregoing chronology of events convincingly establishes that restrictive immunity was not the law at the time of the issuance or maturity of the bonds at issue. Therefore, in order for restrictive immunity, as codified in the FSIA, to have retroactive effect, retroactivity must be the "unequivocal and inflexible import of the terms and the manifest intention of the legislation." *Union Pac. R. Co. v. Laramie Stock Co., supra.*

The FSIA does not contain a clear and unequivocal statement that it was intended to apply retroactively to transactions which predated 1952. Quite to the contrary, the language of the Act is expressly prospective, providing that "claims of foreign states to immunity *should henceforth* be decided by courts of the United States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602. The prospective nature of the Act is further evidenced by the fact that Congress provided for a 90 day delay period in order to give adequate notice to foreign nations of the United States' *new* policy of restrictive immunity. Foreign Sovereign Immunities Act of 1976, Pub.L. No. 94-583, § 8, 90 Stat. 2898 (1976).

In accordance with the plain language of the statute, the FSIA covers claims arising or accruing after its enactment. There being no language to the contrary, this is the obvious "import of the terms and manifest intention" of Congress.

Similarly, the legislative history of the FSIA provides no support for the position that the Act should be given retroactive application. Although the legislative history traces the historical evolution of the FSIA, there is a conspicuous absence of any reference to retroactive application of the Act. S.Rep. No. 94-1310, 94th Cong., 2d Sess. (1976); H.R.Rep. No. 94-1487, 94th Cong., 2d Sess. (1976), U.S.Code Cong. & Admin.News 1976, p. 6604.

At the time of the issuance of the bonds in 1911 up until the date of their maturity in 1951, China relied on the well-founded expectation that the then extant, almost universal doctrine

of absolute sovereign immunity governed all interactions between her and the United States and the citizens of the two respective countries. Concomitantly, China had no apprehension of being haled into a court in the United States to answer for any default of the bond issue. Similarly, the predecessors in interest of the plaintiff bondholders class had no expectation of any right to bring an action in a court of the United States upon a default of the bond issue.

The law dictates that a statute shall not be retroactively applied to alter antecedent rights unless such is the unequivocal import of its terms or the manifest intention of the legislators. The Court concludes that neither the language of the FSIA nor its legislative history evince that it be retroactively applied; and to apply the FSIA in this action would clearly alter the antecedent rights of China.

Recent courts which have addressed this issue have reached a similar conclusion. In *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne,* 605 F.2d 648 (2nd Cir.1979) the Second Circuit declined to apply the FSIA retroactively finding that to do so would prejudice the antecedent rights of the parties. Subsequently, the Second Circuit squarely addressed the retroactive application of the FSIA with respect to subject matter jurisdiction in *Corporacion Venezolana de Fomento v. Vintero Sales,* 629 F.2d 786 (2nd Cir.1980). There the Court found that the FSIA was not intended to retroactively confer subject matter jurisdiction. See also *Ohntrup v. Firearms Center, Inc.,* 516 F. Supp. 1281 (ED. Penn.1981).

Based on the foregoing discussion, the Court finds and concludes that the FSIA cannot be retroactively applied; and, accordingly, this action must be dismissed for want of subject matter jurisdiction. A separate order embodying this opinion shall issue.

DONE this 26th day of October, 1984.

/s/ U. W. CLEMON

United States District Judge
U. W. Clemon

Order Of District Court
Dismissing Action

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

RUSSELL JACKSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL ACTION
	)	NUMBER
THE PEOPLE'S REPUBLIC OF	)	79-C-1272-E
CHINA, a foreign government,	)	
	)	
Defendant.	)	

FINAL JUDGMENT

In accordance with the accompanying memorandum of opinion, it is

ORDERED, ADJUDGED and DECREED that this case shall be, and the same hereby is, DISMISSED, for want of subject matter jurisdiction.

The costs of this action shall be taxed against the plaintiffs, for which execution shall issue.

DONE this 26th day of October, 1984.

/s/ U. W. CLEMON

United States District Judge
U. W. Clemon

APPENDIX H

28 U.S.C. § 1602-1611

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter –

(a) A "foreign state", except as used in section 1608 of this title [28 USCS § 1608], includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title [28 USCS § 1332(c), (d)], nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter [28 USCS §§ 1605-1607].

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connec-

tion with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to –

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided,* That –

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent,

having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit – unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title [28 USCS § 1608] is initiated within ten days either of the delivery of notice as provided in subsection (b) (1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

Whenever notice is delivered under subsection (b) (1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: *Provided,* That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b) (1) of this section.

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter [28 USCS §§ 1605, 1607], the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary in-

juries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim –

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter [28 USCS § 1605] had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services — and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state —

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made —

(1) in the case of service under subsection (a) (4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter [28 USCS §§ 1610, 1611].

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603 (a) of this chapter [28 USCS § 1603 (a)], used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act [see effective date note to 28 USCS § 1602], if –

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property –

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided,* That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be

immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act [see effective date note to 28 USCS § 1062], if –

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605 (a) (2), (3), or (5), or 1605 (b) of this chapter [28 USCS § 1605 (a) (2), (3), (5), (b)], regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608 (e) of this chapter [28 USCS § 1608 (e)].

(d) The property of a foreign state, as defined in section 1603 (a) of this chapter [28 USCS § 1603 (a)], used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if –

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter [28 USCS § 1610], the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act [22 USCS §§ 288 et seq.] shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter [28 USCS § 1610], the property of a foreign state shall be immune from attachment and from execution, if —

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.